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Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 11.

RAYMOND P. GALLAGHER, CHIEF OF POLICE, OF THE CITY OF SPRINGFIELD, MASSACHUSETTS, ET AL.,
Appellants,

v.

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., ET AL.,
Appellees.

BRIEF FOR APPELLANTS.

EDWARD J. McCORMACK, JR.,
Attorney General of Massachusetts,
JOSEPH H. ELCOCK, JR.,
Assistant Attorney General,
ARTHUR E. SUTHERLAND,
S. THOMAS MARTINELLI,
City Solicitor, Springfield,
Massachusetts,
JOHN WARREN McGARRY,
Assistant Attorney General,
Attorneys for Appellants.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 11.

RAYMOND P. GALLAGHER, CHIEF OF POLICE OF THE CITY OF SPRINGFIELD, MASSACHUSETTS, FOSTER FURCOLO, GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS AND EDWARD J. McCORMACK, JR., ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, *Appellants,*

v.

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., IRVING HEAFITZ, MORRIS CHAITOVSKY, RUTH B. COHEN, AND RABBI MOSES D. SHEINKOPF, *Appellees.*

BRIEF FOR APPELLANTS.

(A) A Reference to the Reports of the Opinions Delivered in the Courts Below.

Crown Kosher Super Market, Inc., v. *Gallagher*, 176 F. Supp. 466; 178 F. Supp. 336 (D. Mass. 1959); Record, page 133 *et seq.*, and Record Supplement, page 191 *et seq.*

(B) A Concise Statement of the Grounds on which the Jurisdiction of the Supreme Court of the United States is Invoked; and a Citation to the Statutory Provision and the Time Factors upon which its Jurisdiction Rests.

The appellants here come to the Supreme Court of the United States pursuant to section 1253 of Title 28, United States Code. A notice of appeal herein was served upon the attorneys of record of the several parties by depositing the notice in the United States post office, properly addressed to the offices of those attorneys, postpaid by first-class postage, on the 18th day of September, 1959. The notice of appeal was, on the same day, duly filed in the office of the clerk of the District Court of the District of Massachusetts. Service and filing of the notice of appeal was accomplished within sixty days from the denial of the defendant's motion for a new trial on July 20, 1959; this was timely action under Title 28, United States Code, section 2101(b). *United States* v. *Ellicott*, 223 U.S. 524 (1912). The Governor of the Commonwealth and the Attorney General, who had appeared in the action because of the Commonwealth's interest in enforcing its statutes (Record, pages 4, 33, 47), joined in the appeal.

(C) The Constitutional Provisions and Statutes which the Case Involves.

The plaintiffs below, here appellees, successfully contended in the three-judge District Court that certain Massachusetts Sunday closing legislation, as applied to them, is invalid under the First and Fourteenth Amendments. The appellants contend that the only constitutional provi-

sion which has relevance is the second sentence of the first section of the Fourteenth Amendment:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The Massachusetts legislative enactments which the plaintiffs in their complaint allege to be unconstitutional are Massachusetts General Laws (Tercentenary Edition), chapter 136, sections 5-6 (complaint, paragraph 4; Record, page 12). Chapter 136 is entitled: "Observance of the Lord's Day." (The expression "The Lord's Day" has been used in Massachusetts Sunday legislation since 1647. See Lawes and Libertyes of the Massachusets (1647), *sub* tit. "Fyre"; and see New Plymouth Laws (1672), chapter VII, section 13.) The text of chapter 136, General Laws, is appended to this brief, page 80 and following, as Appendix A.

The three-judge court founded its jurisdiction below on Title 28, United States Code, section 2281, the text of which is:

> "§ 2281. *Injunction against enforcement of State statute; three-judge court required.*
>
> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge

thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

(D) The Questions Here Presented for Review, Expressed in the Terms and Circumstances of the Case.

A. QUESTIONS CONCERNING STANDING OF PLAINTIFFS TO SUE, THE STATUTORY AUTHORITY OF THE THREE-JUDGE COURT TO ENTERTAIN THE CASE, AND THE PROPRIETY OF THE EXERCISE OF JURISDICTION IF IT EXISTS.

(1) Do plaintiffs Heafitz, Chaitovsky and Cohen, three individual persons of orthodox Jewish faith, customers of the corporate plaintiff, show sufficient injury to them to sustain their joinder as plaintiffs herein, by showing that Harold Chernock, doing business as Crown Kosher Super Market of Massachusetts, Inc., has been prosecuted criminally under chapter 136, Massachusetts General Laws; and that further similar prosecutions of him and persons associated in business with him are likely, there being no threat of prosecution of Heafitz, Chaitovsky or Cohen, or of any other customers? Has Rabbi Sheinkopf, Rabbi of a Jewish congregation in Western Massachusetts, such an interest and standing, he not being faced with any prosecution under such laws?

(2) Has any party plaintiff, individual or corporate, any standing to sue in a Federal court as taxpayer, there being no showing of any State expenditure ascribable to enforcement of any Sunday law, and no showing that the jurisdictional amount, or any sum whatever ascribable to chapter 136, Massachusetts General Laws, was required of any plaintiff?

(3) Has Crown Kosher Super Market of Massachusetts, Inc., a business corporation chartered by the Commonwealth, any standing to assert "freedom of religion" under the First or Fourteenth Amendments?

(4) Did the three-judge court below have jurisdiction under the provisions of Title 28, United States Code, section 2281, to enjoin the Chief of Police of the City of Springfield, Massachusetts, from enforcing a State criminal statute, the Chief being neither "any officer of such State" nor "an administrative board or commission acting under" the State statute? *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89 (1935). *Ex parte Collins*, 277 U.S. 565 (1928). *Ex parte Public National Bank of New York*, 278 U.S. 101 (1928).

(5) Assuming, without concession of correctness, that under the Federal statutes the three-judge court did have jurisdiction to issue a decree against Chief Gallagher, was it lawful or proper for the three-judge court, under the circumstances here described, to issue the injunction below? This question is presented, among other "circumstances of the case," in connection with two preceding litigations, both in Massachusetts State courts, one criminal, one civil.

(*a*) *The criminal prosecution in the Massachusetts State courts.*

The Commonwealth of Massachusetts in 1954 prosecuted in its courts "Harold Chernock doing business as Crown Market" for a violation of section 6 of chapter 136 of the General Laws of Massachusetts as amended. "Crown Market" is the same as the Crown Kosher Super Market of Massachusetts, Inc., corporate plaintiff in the present suit (see the answer herein, paragraph 5, Record, page 37, and the com-

plaint in the criminal prosecution set forth in 176 F. Supp. 503, Record Supplement, page 193, and the other proceedings in that prosecution at the pages following that complaint). In defending that prosecution "Harold Chernock, doing business as the Crown Market," could have asserted all Federal constitutional questions here asserted. The Supreme Judicial Court of Massachusetts affirmed Mr. Chernock's conviction in that criminal proceeding. *Commonwealth* v. *Chernock*, 336 Mass. 384, 145 N.E. 2d 920 (1957). Mr. Chernock made no effort to obtain review of that judgment in the Supreme Court of the United States. The time for any such application or effort has long since expired.

(*b*) *The injunction suit in the Massachusetts State courts.*

On June 18, 1954, the corporate plaintiff in the present Federal case, describing itself as "Crown Kosher Super Market of Mass., Inc., alias Harold Chernock d/b/a Crown Market," as petitioner, filed a bill of complaint in the Superior Court of the Commonwealth of Massachusetts against "Raymond P. Gallagher in his position of Chief of Police of the City of Springfield, Massachusetts." (See the answer herein, paragraph 8, Record, page 39.) In that complaint in the State injunction action the corporate plaintiff, here also corporate plaintiff, described itself as "also known as Harold Chernock d/b/a Crown Market"; it recited that "the petitioner" was "found guilty and fined $15.00" on June 15, 1954 (see papers in the State court injunction action set forth in 176 F. Supp. 495, Record Supplement, page 216). This recital refers to the same criminal conviction referred to in subpara-

graph (*a*) immediately above (see a certificate of the clerk of the District Court of Springfield, Massachusetts, set forth 176 F. Supp 507, Record Supplement, pages 194, 195). In the State injunction action the corporate plaintiff obtained a temporary injunction against further criminal prosecutions. After the present action was started, on the consent of the corporate plaintiff the State injunction suit was ended by a "Final Decree Dismissing Bill" (see 176 F. Supp. 501, Record Supplement, page 224). In that State suit the corporate plaintiff could have raised all the issues here raised, with equal standing or lack of standing. In view of these previous proceedings, which afforded a full opportunity to litigate all questions of Federal constitutionality, should the three-judge court have enjoined the defendant in the case at bar?

B. QUESTIONS CONCERNING THE EFFECT OF THE FOURTEENTH AMENDMENT IN THE TERMS AND CIRCUMSTANCES OF THIS CASE.

(6)-(a) As the Massachusetts Supreme Judicial Court, rejecting a "freedom of religion" argument under the Eleventh Amendment of the State Constitution, has held that the Sunday laws of the Commonwealth constitute ". . . a civil regulation, providing for a fixed period of rest . . . derived from its general authority to regulate the business of the community and to provide for its moral and physical welfare" (*Commonwealth* v. *Has*, 122 Mass. 40 (1877)), did the three-judge court below err in failing to apply this statute as it would any other State statute regulating the times when various types of business activity can be carried on, with exceptions which the Legisla-

ture has determined to be beneficial to the people of the Commonwealth?

(6)-(b) Does any provision of chapter 136, General Laws of Massachusetts, deny to any party entitled to standing in the court below any Federal constitutional right in the nature of freedom of religion?

(6)-(c) Does any provision of chapter 136, Massachusetts General Laws, deprive Crown Kosher Super Market of Massachusetts, Inc., or any other party entitled to standing in court, if such there be, of any Federal constitutional right, under the Fourteenth Amendment or other? Specifically, does it deny "economic due process" or deny equal economic protection of the laws, or any privilege or immunity under the Constitution of the United States?

(6)-(d) Was the evidence submitted to the three-judge court sufficient to sustain its findings of fact and conclusions of law as expressed in the opinion of its majority of judges?

(6)-(e) Was the decree finally entered consistent with, and justified by, the findings of fact and conclusions of law, insofar as these were sustainable by the record below?

(E) A Concise Statement of the Case Containing All that is Material to the Consideration of the Questions Presented, with Appropriate References to the Printed Record.

This action for declaration of unconstitutionality of certain Massachusetts "Sunday Closing Laws," and for an injunction against their enforcement, was instituted in the United States District Court for the District of Massachusetts by the filing of a complaint on May 1, 1958 (Record, page 12 *et seq.*). The corporate plaintiff is chartered as

a business corporation under the laws of Massachusetts (see the certificate of incorporation, set forth 176 F. Supp. 509, Record Supplement, page 201). It operates a super market in Springfield in that Commonwealth. Its president, general manager and "50 per cent owner of the business" is Harold Chernock (see Mr. Chernock's testimony, Record, pages 99, 104). It sells food, including some non-kosher food, on Sunday and on every other day in the week except Saturday, to any persons who present themselves as customers, regardless of religion (Record, page 125). The individual plaintiffs, Heafitz, Chaitovsky and Cohen, are orthodox Jewish customers of the corporate plaintiff who require kosher food by reason of their religious convictions. They claim to be situated similarly to many other orthodox Jewish customers of Crown Market (paragraphs 15 and 16 of the complaint, Record, pages 14, 15). The individual plaintiff, Rabbi Sheinkopf, complains "on behalf and at the request of" approximately fifty orthodox Rabbis of Massachusetts that he is "charged with the duty of seeing that the orthodox Jews in the Springfield area have foods prepared in accordance with the laws of Kashruth available to them" (Record, page 15).

On June 13, 1958, plaintiffs moved to amend the complaint by adding an allegation that all plaintiffs pay taxes to Massachusetts and portions of those taxes are used to enforce Massachusetts General Laws, chapter 136, section 5 (Record, page 35).

The defendant Gallagher is Chief of Police of the City of Springfield and is charged with enforcing Massachusetts General Laws, chapter 136, sections 5-6, as amended. The complaint alleges that Chief Gallagher has arrested and prosecuted the manager of Crown Market for keeping the store open on Sunday (paragraph 20, Record, page 15). The complaint further states (paragraph 21, Rec-

ord, page 16) that sections 5 and 6 of chapter 136 establish "Sunday as the Lord's day contrary to the religion of the Plaintiffs"; that the orthodox Jewish customers of the Crown Market cannot supply their religious dietary needs with the store closed on Sunday; that the plaintiff Rabbi Sheinkopf and the other rabbis he undertakes to represent, cannot fulfill their religious duties if the stores selling kosher foods are closed under chapter 136; that the corporate plaintiff, obliged by law to keep its market closed on Sunday, also keeps its market closed on Saturday "because of the religious belief of its stockholders, officers, and employees and customers." The corporate market complains, therefore, that it is placed in a competitive disadvantage relative to markets which need be closed only on Sunday. It also complains that other stores and vendors can, under chapter 136, sell numerous food products on Sunday, "much of which is neither necessary nor in keeping with the Lord's day, while forbidding the sale, in said Plaintiff's store, of food products having a religious significance" (paragraph 21E, Record, page 17).

The complaint prayed that the action be heard by a three-judge Federal court; that the court adjudge sections 5 and 6 of chapter 136 of Massachusetts General Laws unconstitutional, void and unenforceable as applied to the plaintiffs; and that the court issue a preliminary and a final injunction against the defendant in his official capacity "and all other Massachusetts and local authorities who would have any authority to take any action toward the enforcement of said laws" (Record, page 18).

The answer of Chief Gallagher admitted his authority to enforce State laws; and recited the arrest, prosecution, and convictions of "Harold Chernock, the manager of the Crown Market," and affirmance by the Supreme Judicial Court of the Commonwealth in the case entitled *Common-*

wealth v. *Chernock* (which is the same prosecution recited in the copies of the official papers therein, 176 F. Supp. 503-520, Record Supplement, pages 191-215). The answer further recited (paragraph 7, Record, page 38) that Crown Kosher Super Market of Mass., Inc., sought injunctive relief against the defendant from prosecution under General Laws, chapter 136, sections 5 and 6, by a bill in equity filed in the Hampden County Superior Court of the Commonwealth of Massachusetts, and that an interlocutory decree was rendered in that action against Chief Gallagher on June 25, 1954, which was still continuing in effect on the date of filing the answer.

The petition in that State court injunction action, No. 81,716 (set forth at 176 F. Supp. 495, Record Supplement, pages 216-218), recites as petitioner "Crown Kosher Super Market of Massachusetts, Inc. a corporation . . . also known as Harold Chernock d/b/a Crown Market." It recites that on June 15, 1954, "the petitioner" was prosecuted, found guilty and fined $15 on each of three complaints of violations of chapter 136, of the General Laws. The petition then prayed for a preliminary injunction enjoining the Chief of Police of the City of Springfield from "causing to be served further complaints upon the petitioner until such time as the question of so-called 'Sunday Law' violations on the part of the petitioners' market shall have been decided on appeal" (see 176 F. Supp. 495-496, Record Supplement, page 217). As the answer herein recites, the injunction so issued by the Massachusetts Superior Court continued in effect until after the present Federal injunction suit had been commenced, which occurred May, 1958. In the Massachusetts State court injunction action, Equity No. 81,716, the defendant, Chief of Police Gallagher, appeared by counsel. Some five months after the present Federal three-judge injunction action had been

started, on consent of the petitioner "Crown Kosher Super Market of Mass., Inc., alias Harold Chernock d/b/a Crown Market," but, as the final State decree indicates, without consent of the defendant therein, a final decree was entered dismissing the State court bill. That decree is set forth in 176 F. Supp. at page 501, Record Supplement, page 224.

The Federal injunction case then proceeded to trial on November 13, 1958, at Boston, Massachusetts, before Chief Judge Magruder, Circuit Judge Woodbury and District Judge McCarthy. The Governor of the Commonwealth and the Attorney General entered an appearance because of the interest of the Commonwealth in enforcing its statute (Record, pages 4, 33, 47). Facts were presented to the court, not only by stipulations of the parties (Record, page 40 *et seq.*), but also by the testimony of Mr. Harold Chernock (Record, pages 99-129).

In the course of an argument herein before the three-judge Federal court for dismissal, and later in the trial, counsel for the Commonwealth of Massachusetts and counsel for the plaintiffs discussed both the previous criminal case in the State courts and the previous state equity case, No. 81,716 (Record, pages 51 *et seq.*, 95, 114, 117, 128, 129).

Mr. Chernock took the stand as the only witness called on the plaintiffs' behalf. He testified that, in addition to kosher foods, he carried some other foods, though he testified that no other super market was open on Sunday in the Springfield area (Record, pages 123, 124). Asked: "How about yours?" he answered: "I am" (Record, page 124). With ready, unstudied use of the first person singular he identified his individual self with his corporate market. When asked how much of the Sunday business of the super market was done as a result of purchases by persons who are not orthodox Jews, Mr. Cher-

nock testified: "I don't believe there is—very, very little" (Record, page 124). When asked: "Do you make sales to persons, to anybody who's in this room?" he answered: "We don't discriminate. It would be bad business not to" (Record, page 125).

Following the trial Chief Judge Magruder delivered an opinion (176 F. Supp. 466, Record, page 133 *et seq.*), in which Circuit Judge Woodbury concurred, holding that—

> "all the objections which have been taken under the Fourteenth Amendment to the constitutionality of the statute in question are well taken."

The two prevailing judges directed that their opinion constitute their findings of fact and conclusions of law (176 F. Supp. 477, Record, page 148). District Judge McCarthy filed a dissenting opinion (176 F. Supp. 477, Record, page 149 *et seq.*). A petition for a rehearing was denied with a *per curiam* opinion on July 20, 1959 (176 F. Supp. 492, Record, page 179). District Judge McCarthy filed a dissent from the denial of a rehearing (178 F. Supp. 336, Record, page 184).

A decree, entered on June 12, 1959, declared chapter 136 of the Massachusetts General Laws, as amended, "unconstitutional, void, and unenforceable as applied to the plaintiffs in this action, in so far as it requires the Crown Kosher Super Market to remain closed on Sunday after it has remained closed on the preceding Friday night and Saturday," and enjoined Chief Gallagher from enforcing chapter 136, section 5, against the plaintiffs.

The present appeal followed. This Court noted probable jurisdiction on April 25, 1960, designating the case as No. 532 in the October, 1959, term. It is No. 11 on the October, 1960, Appellate Docket.

Other Sunday-closing cases now pending in the Supreme Court of the United States:

On April 25, 1960, this Court also noted probable jurisdiction in *McGowan v. Maryland*, then No. 438, now No. 8 on the October, 1960, Appellate Docket, reported below 22 Md. 123, 131 A. 2d 156 (1959), in which the Maryland Court of Appeals had affirmed a conviction of the defendants for selling merchandise in a store in violation of the Maryland Sunday closing laws.

On the same day this Court also noted probable jurisdiction in No. 699, *Two Guys from Harrison-Allentown, Inc.*, v. *McGinley*, reported below in 179 F. Supp. 944 (D.C. E.D. Pa. 1959), in which a three-judge District Court, with an opinion by Circuit Judge Hastie, refused to enjoin enforcement of the Pennsylvania Sunday closing laws as applied to a suburban department store open every day of the week but doing about a third of its business on Sunday. The Court declined to follow *Crown Kosher Super Market* v. *Gallagher*, 176 F. Supp. 466 (D.C. D. Mass. 1959). *Two Guys from Harrison-Allentown, Inc.*, v. *McGinley* is No. 36 on the October, 1960, Appellate Docket.

On May 23, 1960, the Supreme Court of the United States noted probable jurisdiction of the appeal of the plaintiff in *Braunfeld* v. *Gibbons*, then No. 845, now No. 67 on the October, 1960, Appellate Docket. This is an appeal from a judgment of the United States District Court, Eastern District of Pennsylvania, 28 U.S. Law Week 3310, 3346, upholding Pennsylvania's 1959 Sunday law. This case, like *Crown Kosher*, raises the issue of constitutionality of Sunday closing laws as applied to orthodox Hebrews; Fourteenth Amendment questions both of religion and classification are involved.

A fifth case is also pending in the Supreme Court of the United States, *Bargaintown, U.S.A., Inc.*, v. *Whitman*,

No. 891 on the October, 1959, calendar. On April 26, 1960, an appeal was filed by Bargaintown from a decree of the United States District Court for the Middle District of Pennsylvania upholding Pennsylvania Sunday legislation attacked on Fourteenth Amendment grounds involving both religious and classification questions, 28 U.S. Law Week 3334. When the Supreme Court adjourned at the end of June, 1960, no probable jurisdiction had as yet been noted. The case is No. 76 on the October, 1960, Appellate Docket.

(F) A Summary of the Argument Made Hereafter in the Body of the Brief.

(*a*) SUMMARY OF ARGUMENTS CONCERNING STANDING OF PLAINTIFFS TO SUE; THE STATUTORY AUTHORITY OF THE THREE-JUDGE COURT TO ENTERTAIN THE CASE; AND THE PROPRIETY OF THE EXERCISE OF ITS JURISDICTION—POINTS I TO V, INCLUSIVE.

I. The individual plaintiffs have no standing to sue. (Pages 22-27.)

No one of the individual plaintiffs, Heafitz, Chaitovsky and Cohen, customers of the plaintiff corporation, nor the individual plaintiff Rabbi Sheinkopf had sufficient standing to be heard as a plaintiff in the trial court. The Commonwealth of Massachusetts has shown no intention of prosecuting any of the individual defendants for disobedience of the Sunday laws (if, indeed, these laws make such prosecutions possible). The majority opinion below found prosecution of the individual defendants disallowed by State law (see 176 F. Supp. at page 471, Record, page 139). The relation of customers of the corporate plaintiff and of the Rabbi of their faith to the prosecution of

the corporation or its functionaries is too remote to sustain this litigation.

II. No party has standing to sue as a taxpayer. (Pages 27-28.)

No party hereto has standing to sue or to appeal as a taxpayer of the Commonwealth. There is no testimony on the record concerning any expense to the Commonwealth caused by enforcing the Sunday laws as applied to the plaintiff which would not have been incurred in the ordinary course of public administration in Massachusetts. See *Doremus* v. *Board of Education of the Borough of Hawthorne,* 342 U.S. 429 (1952). Nor was there any showing of any damage, in the jurisdictional amount (then $3000), or any other, accruing against the corporate or any other plaintiff, by reason of any Commonwealth tax whose proceeds defray any expense connected with the Sunday laws.

III. The corporate plaintiff has no standing to claim impaired freedom of religion. (Pages 28-31.)

A Massachusetts business corporation, such as Crown Kosher Super Market of Massachusetts, Inc., the corporate plaintiff herein, has no "religious belief" or "religious liberty," and had no standing in court to assert that its free exercise of religion was impaired. The corporate super market, if it has any grievance to assert, must rest on economic due process, or on a denial of equal economic protection.

IV. Title 28, United States Code, section 2281, gives a three-judge court no jurisdiction to enjoin a municipal officer. (Pages 32-33.)

The three-judge court below should have granted the defendant's motion to dismiss because the statute creat-

ing three-judge courts gives them no jurisdiction of actions against municipal, as distinguished from State, officials. Title 28, United States Code, section 2281. *Ex parte Public National Bank of New York*, 278 U.S. 101 (1928). *Browder* v. *Gayle*, 142 F. Supp. 707 (D.C. M.D. Ala. 1956); affirmed on motion, 352 U.S. 903 (1956); petition for clarification and rehearing denied, 352 U.S. 950 (1956), is distinguishable because members of the Alabama Public Service Commission, State and not local officers, were there made defendants in an injunction action.

V. Even if it had had jurisdiction below, the three-judge court should not have exercised it; the supermarket, and Mr. Chernock, who does business under its name, had ample opportunity to litigate constitutional issues in the previous State litigations. (Pages 33-42.)

Even if, contrary to the contentions of the appellant, a three-judge Federal court had jurisdiction of this case under Title 28, United States Code, sections 2281 and 2284, the court should not here have exercised its equitable jurisdiction. Two proceedings or sets of proceedings in the courts of Massachusetts have involved the Crown Kosher Super Market. The first of these was a group of three prosecutions against Harold Chernock, doing business as Crown Market, the criminal case recited at paragraph 20 of the complaint herein (Record, page 15; see 176 F. Supp. 503-508, Record Supplement, pages 191-198). The second of these proceedings was equity case No. 81,716 in the Superior Court for the Commonwealth of Massachusetts, brought by petition of "Crown Kosher Super Market of Mass. Inc., alias Harold Chernock d/b/a Crown Market," against Chief Gallagher, reciting threats of criminal prosecution against the petitioner in terms conceding the identity of "the petitioner,"

Crown Kosher Super Market of Massachusetts, Inc. (see 176 F. Supp. 495, Record Supplement, page 216), and Harold Chernock doing business as Crown Market, defendant in the criminal prosecutions (see 176 F. Supp. 503-508, Record Supplement, pages 191-198). It was open to Mr. Chernock and to the Crown Kosher Super Market of Massachusetts, Inc., to raise in the criminal case and in the State injunction case all the questions of Federal constitutional right raised in the three-judge court Federal case from which the appeal is now taken to this Court. The State litigation has long since terminated—the criminal case by affirmance in the Supreme Judicial Court of Massachusetts; the civil injunction case by final decree dismissing the bill on plaintiff's consent. The United States District Court should not have entertained jurisdiction in a new injunction suit. The petitioner should have been held barred by a principle comparable to that of *res judicata,* or collateral estoppel, or estoppel by record. And, in any event, full, clear and complete means of relief being available in the State courts, the Federal court as a matter of discretion should not have entertained jurisdiction. *Douglas* v. *City of Jeannette,* 319 U.S. 157 (1943). *Boynton* v. *Fox West Coast Theatres Corp.,* 60 F. 2d 851 (C.C.A. 10, 1932).

(*b*) SUMMARY OF ARGUMENTS CONCERNING THE EFFECT OF THE FOURTEENTH AMENDMENT IN THE TERMS AND CIRCUMSTANCES OF THE CASE—POINTS VI-A TO VI-F, INCLUSIVE.

VI-A. Sunday closing laws are today social and economic regulation—presumptively valid. (Pages 43-54.)

Massachusetts Sunday closing laws, even though prompted centuries ago by a religious tradition, have in the passage of time come to constitute a system of economic and social legislation, supplementary to and concurrent

with the policy of laws providing for limited hours of work and laws guaranteeing every man a day's rest in seven. The Massachusetts Sunday closing laws should be judged with the same strong presumption of constitutional validity which attaches to any other State social and economic legislation.

VI-B. Saturday sabbatarian closing is not imposed by "State action"; the Fourteenth Amendment is not called into effect by religious rules forbidding Saturday work. (Pages 54-56.)

Massachusetts has not, through its legislation, through the police of Springfield, or through the State courts, denied to plaintiffs any constitutional rights by requiring Sunday closing. The plaintiffs' abstention from business on Saturday was not commanded by the Commonwealth. The gravamen of the plaintiff's complaint arises from private action, not State action. The respected religious impulse which renders Saturday for the plaintiffs a day of lay inactivity, and the consequences of this Saturday inactivity which may for the plaintiffs render irksome compliance with those Sunday closing laws which govern the rest of the inhabitants of the Commonwealth, have no connection with any "State action," without which the Fourteenth Amendment has no effect.

VI-C. The United States Supreme Court has frequently and consistently upheld Sunday closing laws as constitutional. (Pages 56-64.)

The United States Supreme Court, in a long series of cases either affirming State court judgments or dismissing appeals from State courts and from a Federal court, has upheld State Sunday closing laws, has found them lay, social and economic regulation, and has rejected contentions that they unconstitutionally regulate or affect religious matters; that they so classify persons they affect as

to deny equal protection of the laws; that they are "arbitrary" and so deny due process of law; or that they otherwise conflict with the Federal Constitution.

VI-D. The great mass of legislation and adjudication in practically all States, enacting and upholding Sunday closing laws, demonstrates the reasonableness of the classifications involved. (Pages 65-76.)

The great mass of Sunday closing legislation in almost every part of the United States, which almost everywhere contains exceptions of various classes, and comparable legislation in other countries, demonstrate the reasonableness of such legislation with its classifications, according to the principle of *Muller* v. *Oregon*, 208 U.S. 412 (1908). The overwhelming majority of State adjudications upholding such legislation, tabulated in Appendix B of this brief, reinforce this conclusion. A decent respect to the opinions of mankind requires that the Massachusetts legislation be upheld.

VI-E. The facts herein stipulated or testified to do not show the Massachusetts Sunday closing laws unconstitutional as applied. (Pages 76-77.)

Neither the evidence nor any stipulation of fact before the three-judge District Court herein discloses any circumstances which make any Massachusetts Sunday closing laws unconstitutional as they are applied to the plaintiff Crown Kosher Super Market of Massachusetts, Inc., nor which makes any such law unconstitutional as it may affect any individual plaintiff.

VI-F. The decree herein is not justified by the opinion. (Pages 77-78.)

The decree of the three-judge court herein goes beyond the constitutional effect of any "findings and conclusions" embodied in the opinion of that court reported 176 F. Supp.

466 (1959), Record, page 133 *et seq.* Even if the "findings of fact" in that opinion are all accepted, the conclusions of law, and the decree predicated thereon, are not justified in departing as they do from the doctrine of the Supreme Court of the United States settled in a long series of affirmances and dismissals of appeals as presenting no substantial Federal question. Furthermore, the decree herein is in a form which, taken with the District Court opinion, leaves law enforcement in Massachusetts uncertain. Is an enforcement officer to regard as unconstitutional in Massachusetts the compulsory Sunday closing of delicatessen shops and super markets which sell certain kosher products? (see the opinion below, 176 F. Supp. at page 469, Record, page 135). Five per cent of non-kosher stock-in-trade will not, apparently, justify Massachusetts in shutting up the Crown Market. Would five per cent of kosher stock-in-trade justify another market in staying open on Sundays to serve strict Jewish sabbatarians who remained at home on Saturdays and authorize that market to sell to the general public as well? Does the evidence or opinion justify a decree giving Crown Kosher Super-Market a Springfield monopoly? The decree does not tell clearly what is given.

Conclusion of arguments summarized.

The decree below should be reversed and the complaint dismissed, in accordance with the previous adjudications of the Supreme Court of the United States and of the overwhelming majority of State courts which have spoken on the question here at issue.

At the very least, the matter should be remanded to the court below, to take more extensive testimony, as asked in the petition for rehearing presented by the Attorney

General of Massachusetts below (see 176 F. Supp. 466, at page 492; 178 F. Supp. 336; Record, pages 176, 179 and 184), and to give opportunity for clarifying the law in the State courts. *Harrison* v. *National Association for the Advancement of Colored People*, 360 U.S. 167 (1959).

(G) The Argument for Appellants.

a. Arguments Concerning Standing of Plaintiffs to Sue, Statutory Jurisdiction of the Three-Judge Court, and the Propriety of its Exercise—Points I to V, Inclusive.

I.

No One of the Individual Plaintiffs, Heafitz, Chaitovsky and Cohen, Customers of Crown Kosher Super Market; nor the Individual Plaintiff, Rabbi Sheinkopf, has Any Legal Interest in the Application of Chapter 136, Massachusetts General Laws, to the Corporate Plaintiff Super Market Sufficient to Give Any Such Individual Plaintiff Standing as a Party to the Federal Injunction Suit.

The individual plaintiffs entertain religious beliefs requiring them to abstain from certain foods unless specially prepared, to abstain from labor on Saturday, and, in the case of Rabbi Sheinkopf, to perform religious services for a congregation. The appellants and their counsel, by their argument here, neither express nor intend anything but sincere respect for the faith and for the scruples of these plaintiffs. The appellants point out that the law of the Commonwealth does not require these plaintiffs to work or do any business on their Sabbath, nor to consume any forbidden food or drink. There is no affirmative act re-

quired of these plaintiffs comparable to the flag salute required by West Virginia law and regulation of the school children in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943). These individual plaintiffs make no contention that they have been threatened with prosecution for violation of any Sunday legislation, nor do they complain on any such basis. The majority of the three-judge court below found that ". . . these particular individual plaintiffs cannot, either by shopping at the corporate plaintiff's store or by inspecting it, or by any other act in the capacities in which they appear here, violate the Sunday law" (176 F. Supp. at 471, Record, page 139). See *United Public Workers of America (C.I.O.)* v. *Mitchell*, 330 U.S. 75 (1947). Appellants have found no decision of the Supreme Court or any lower Federal court holding that application of State regulatory legislation to a merchant creates a Federal case or controversy between the merchant's customers and the State which gives the customers standing in court to challenge the constitutionality of the legislation. *A fortiori*, no Supreme Court or other case gives standing to a minister of religion to challenge the legality of holidays on which State law forbids a merchant to sell goods to the public, including members of the minister's congregation.

The majority opinion of the three-judge court below stated (176 F. Supp. 466, at page 472):

> "If we were required to go into the matter, which we are not now, we would be prepared to hold that the facts of this case bring it squarely within the exception to the Supreme Court's 'rule of practice' forbidding one party to assert somebody else's constitutional rights, so that all plaintiffs could argue all grounds."

In support of this statement that court cites—

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925).
Pearl Assurance Co. v. *Harrington*, 38 F. Supp. 411 (D.C. D. Mass. 1941); affirmed, 313 U.S 549 (1941).
Barrows v. *Jackson*, 346 U.S. 249 (1953).

In *Pierce* a State statute required all children to go to public school. This statute thus forbade children to use the school week to attend a religiously maintained school, and legislated out of existence the religious school's source of pupils. In *Pearl Assurance* an English corporation was heard, though unsuccessfully, to urge the invalidity of a Massachusetts statute requiring it to have a United States citizen or corporation as its resident manager. In *Barrows* one white man sued another white man in a California State court; the plaintiff complained that the defendant had violated a restrictive covenant by selling certain realty without incorporating the restrictive clause in the deed, and by permitting "non-Caucasians" to occupy the premises. The Supreme Court of the United States affirmed a State court dismissal of the complaint, stating (at page 258):

> "This Court will not permit or require California to coerce respondent to respond in damages for failure to observe a restrictive covenant that this Court would deny California the right to enforce in equity, *Shelley, supra;* or that this Court would deny California the right to incorporate in a statute, *Buchanan* v. *Warley*, 245 U. S. 60; or that could not be enforced in a federal jurisdiction because such a covenant would be contrary to public policy: . . ."

The difference is apparent between the present Crown Kosher litigation, and the Supreme Court's refusal in *Barrows* to force California to oblige Jackson to pay money because Jackson sold to a Negro. The State, through its court, has declined to do so; the United States Supreme Court properly refused to compel it. The instant case is much more like *Tileston* v. *Ullman*, 318 U.S. 44 (1943), in which the Supreme Court held that a physician had no standing to assert danger to his patients' lives from a Connecticut statute forbidding use of, or advice on, contraceptives. In the present Crown Kosher suit Massachusetts has applied no legal sanctions to the individual plaintiffs; and the corporate market can no more stand on customers' asserted rights than Dr. Tileston could stand on the needs of his patients.

The three-judge court below stated (176 F. Supp. at 471):

> "As stated in the complaint, the grounds for challenging the Sunday law are all founded upon the Fourteenth Amendment. Simply stated, these are: (1) That the Lord's day law is a law respecting the establishment of religion and denying the free exercise of religion and hence is violative of the due process clause of the Fourteenth Amendment. See Douglas v. City of Jeannette, supra, 319 U.S. at page 162, 63 S. Ct. at page 880; (2) that the statute deprives the corporate plaintiff of its property and the other plaintiffs of their liberty arbitrarily and therefore is a denial of due process of law guaranteed by the Fourteenth Amendment; and (3) that the statute denies the corporate plaintiff the equal protection of the laws guaranteed by the Fourteenth Amendment. It can hardly be disputed that the corporate plaintiff has standing to assert the grounds numbered 2 and 3

supra, and that the individual plaintiffs have standing to assert the grounds numbered 1 and 2 supra."

The appellants here respectfully but emphatically do dispute the standing of any plaintiff in the case to challenge any Massachusetts statute as an "establishment" of religion." A State "establishment" which is not properly challenged by a taxpayer (see Point III, below) and which offends a plaintiff only because it exists, not because it does him some other and more particular harm, gives that plaintiff no standing in court. The plaintiff Doremus in *Doremus* v. *Board of Education of the Borough of Hawthorne*, 342 U.S. 429 (1952), would have had no standing in a three-judge Federal District Court to enjoin the Bible reading complained of if the plaintiff spoke for no child in school. He had proved no cost to the taxpayers; *a fortiori*, no money damage to himself, and, *a multo fortiori*, no money damage of the jurisdictional amount to sustain a Federal court suit. Confrast the position of the parents of school-children in another Bible-reading case, *Schempp* v. *Abington Township*, 177 F. Supp. 398 (D.C. E.D. Pa. 1959). In that case, as in *Doremus*, one pupil graduated prior to conclusion of the litigation. "All the parties," remarked the court (page 399), "are in accord that the application for an injunction is moot as to him."

The standing of the individual plaintiffs to complain here of a denial of the free exercise of religion, and of a deprivation of liberty "arbitrarily" (176 F. Supp. 471, Record, page 139), is not easily separated from consideration of the merits. The chain of consequences connecting any action of the Commonwealth of Massachusetts with the plaintiffs' free exercise of religion or other liberties is too long and has too many links for legal recognition. They complain that the personnel of the Crown Market are faith-

ful followers of Jewish doctrine, and hence that the Market is closed on Saturday. Massachusetts has not caused this closing. The plaintiffs Heafitz, Chaitovsky and Cohen complain (complaint, paragraphs 16 and 17, Record, page 15) that business and domestic reasons prevent their shopping on week-days; but these allegations are neither stipulated nor proved by testimony. Even if these matters had been established, they would not be ascribable to Massachusetts. Rabbi Sheinkopf does not even assert that he is a customer of the Crown Market. His connection with action by Massachusetts is that of spiritual leader of persons who, for non-governmental reasons, do not shop on Saturday and who complain that, under the law of Massachusetts, a store where they want to buy may not lawfully sell on Sunday, save within narrow limits.

The remoteness of the connection of these individuals with any State action of Massachusetts takes them out of the case entirely. The motion to dismiss should have been granted as to the individual plaintiffs.

II.

No Party, Individual or Corporate, has Here Any Standing as a Taxpayer.

Three facts stand out respecting any standing of any taxpayer plaintiffs in this case.

(1) The court below, in the opinion constituting its findings of fact and conclusions of law, makes no mention of any taxpayer standing.

(2) At no place in the record does there appear any statement or proof that the enforcement of the Massachusetts Sunday legislation generally, or enforcement against Crown Market or Harold Chernock, cost any sum additional to the general cost of the Com-

monwealth's business. The state of the record is in this respect like that in *Doremus* v. *Board of Education of the Borough of Hawthorne*, 342 U.S. 429 (1952). As *Doremus* showed, there would have been in the present situation no Federal court jurisdiction on appeal by a taxpayer from a State judgment. For the same reason there is no jurisdiction for a taxpayer in a Federal court of first instance.

(3) Even if, contrary to the inference from *Doremus*, one presumes some State cost ascribable to the instant Sunday law enforcement, still there is a total lack of showing that any plaintiff taxpayer paid any fraction of this, and all the more a total lack of any showing on behalf of any taxpayer, of the $3000 jurisdictional amount, required when this case was instituted. No party paid $3000 more taxes because of the Massachusetts Sunday laws, so far as this record shows.

As Mr. Justice Frankfurter wrote in *Coleman* v. *Miller*, 307 U.S. 433 (1939), at 465:

> ". . . the ordinary state taxpayer's suit is not recognized in the federal courts . . ."

Certainly no party has here established standing in court as a taxpayer.

III.

The Crown Kosher Super Market of Massachusetts, Inc., has No Religion; it has No Standing to Assert Impairment of Religious Freedom.

This point is difficult to document as it seems so obvious. Despite judicial recognition of a corporation's status as

a "citizen" for purposes of diversity jurisdiction, and as a "person" for economic protection of freedom of publication under the Fourteenth Amendment, a corporation is not a citizen under the Privileges and Immunities Clause (*Selover, Bates & Co.* v. *Walsh*, 226 U.S. 112 (1912)). See the opinion of Mr. Justice Roberts, in which Mr. Justice Black concurred, in *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496 (1939), at page 514. And certainly no corporation can be baptized. The phrase "soulless corporation" here applies directly.

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925), is not in conflict with this principle. The opinion of the Supreme Court there rests on the economic harm done to the corporation maintaining the school. The Supreme Court, by the same opinion, protected Hill Military Academy, a lay school. Mr. Justice McReynolds wrote for the Court, at page 535:

> "Appellees are corporations and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. *Northwestern Life Ins. Co.* v. *Riggs*, 203 U. S. 243, 255; *Western Turf Association* v. *Greenberg*, 204 U. S. 359, 363. But they have business and property for which they claim protection."

In *Pierce* and *Hill* the public who might have patronized the two schools were by State statute precluded from sending their children there. Massachusetts, in contrast, keeps no person, individual plaintiff here or any other, from patronizing the Crown Kosher Super Market save on those days when the whole Massachusetts public is denied that opportunity.

The Supreme Court of Illinois, rejecting the contention of certain corporate and other car dealers that a Sunday closing ordinance interfered with their religious rights under the Illinois Constitution, wrote:

> "The plaintiffs, most of whom are corporations, have not alleged that they are members of any religious groups that would be affected by this, and therefore they have no standing to raise the objection."
>
> *Humphrey Chevrolet, Inc.*, v. *City of Evanston*, 7 Ill. 2d 402, at 408, 131 N.E. 2d 70, at 73 (1956).

The charter of a Massachusetts business corporation can be amended or repealed by appropriate legislation at any time, under the power reserved by chapter 155, section 3, of the Massachusetts General Laws, which provides:

> "SECTION 3. [Charters Subject to Alteration or Repeal.] Every act of incorporation passed since March eleventh, eighteen hundred and thirty-one, shall be subject to amendment, alteration or repeal by the general court. All corporations organized under general laws shall be subject to such laws as may be hereafter passed affecting or altering their corporate rights or duties or dissolving them. Corporations shall, notwithstanding such repeal or dissolution, be subject to sections fifty-one and fifty-two. Such laws of amendment, alteration or repeal or such dissolution shall not take away or impair any remedy which may exist by law consistently with said sections against the corporation, its members or officers, for a liability previously incurred."

And the Massachusetts Constitution, Amendment LIX of 1918, provides:

> "[*Every Charter, etc., Subject to Revocation, etc.*] Every charter, franchise or act of incorporation shall forever remain subject to revocation and amendment."

This power of Massachusetts is entirely inconsistent with any idea that a corporation, which may tomorrow be dissolved by general law, and so may cease to exist, still has some religious commitment in its artificial person which permits it to assert religious freedom as if it were one of the school-children in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

The Crown Kosher Super Market of Massachusetts, Inc., must thus treat this litigation as a "pocketbook case." Whatever standing it has here is the asserted protection of its business interests against a statute which treats it exactly the same as every other super market. Indeed, the corporate plaintiff below had as its principal complaint precisely this equality of treatment. And the effect of the decree below is to give it a favored position on Sunday, because of the religious beliefs of its officers and employees.

The lack of sustainable claims to religious freedom in the corporate being of a super market is perhaps conceded by the majority opinion below. "It can hardly be disputed that the corporate plaintiff has standing to assert the grounds numbered 2 and 3, supra . . ." 176 F. Supp. 471-472; Record, page 139. The omission of ground numbered 1, "establishment" and religious freedom, is significant.

IV.

The Three-Judge Court Below should have Granted the Motion to Dismiss on the Ground that Section 2281 of Title 28, United States Code, gives a Three-Judge Court No Jurisdiction to Enjoin a Purely Local Officer, as Distinguished from an Officer of the State.

The text of section 2281 is:

> "*§ 2281. Injunction against enforcement of State statute; three-judge court required.*
>
> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Chief Gallagher is a municipal, not a State, officer. In *Ex parte Public National Bank*, 278 U.S. 101 (1928), the Supreme Court refused a writ of mandamus to compel the assembling of a three-judge court to hear a suit to enjoin a city tax official from enforcing a tax. The statute, Title 28, United States Code, section 2281, was then Judicial Code, section 266. Mr. Justice Sutherland wrote for the Court (at page 104):

> "The suit here involved the constitutionality of a state statute, but it was not brought to restrain 'the action of any officer of such State in the enforcement'

thereof. The persons sued are municipal officers, having no state functions to perform, but charged only with the duty of collecting and receiving taxes assessed by other city officials in no respect for the use of the state but for and in behalf of the city alone. . . . § 266 requires the concurrence of two things in order to give the three-judge court jurisdiction: (1) the suit must seek to have a state statute declared unconstitutional, or that in effect, and (2) it must seek to restrain the action of *an officer of the state* in the enforcement of such statute. See *Henrietta Mills Co.* v. *Rutherford County*, 26 F. (2d) 799, 800; *Connor* v. *Board of Comm'rs of Logan County, Ohio*, 12 F. (2d) 789, 790; . . . The second requisite here is lacking."

Browder v. *Gayle*, 142 F. Supp. 707; affirmed, 352 U.S. 903 (1956), is distinguishable, as in that case State officers —members of the Alabama Public Service Commission— were defendants.

V.

Assuming without Conceding that there was Statutory Jurisdiction in the Three-Judge Court Below, That Court should Not have Exercised Jurisdiction Herein.

The facts on which this argument is based are set forth in detail, with reference to the Record and opinions below, in the Statement of Questions Presented for Review (5) *a* and *b*, pages 5-7 of this brief, and in the summary of this point, V, at pages 17 and 18 of this brief. To avoid unnecessary repetition, this matter is not all here restated. The Court is reminded that, in previous criminal prosecutions brought by Massachusetts against "Harold Chernock, doing business as Crown Market," the same statute

here in question was held constitutional in a prosecution of the only plaintiff's witness in the present case, Harold Chernock, president of the corporate plaintiff here, its general manager, and owner of 50 per cent of its stock. The papers in that criminal case are set forth in 176 F. Supp. 503-520, Record Supplement, pages 191-215. In that criminal litigation Mr. Chernock could have argued all the constitutional points here asserted on behalf of his market. The Supreme Judicial Court affirmed Chernock's convictions. *Commonwealth* v. *Chernock*, 336 Mass. 384, 145 N.E. 2d 920 (1957). Chernock took no step to obtain review in the Supreme Court of the United States.

The prevailing opinion below discounts the effect of that previous criminal adjudication on the ground (see 176 F. Supp. 470, Record, page 137) that in it the defendant raised issues of State constitutionality but not Federal constitutionality; that *res judicata* was not herein pleaded (or so the Court stated); and that it is "obvious" that neither the corporate plaintiff nor any individual plaintiff herein is bound by those criminal judgments.

As to the absence of a pleading of *res judicata, collateral estoppel, estoppel by record* or similar matter, the appellants point out to this Court that the answer (paragraph 5, Record, page 37) recites the previous criminal case in reasonable detail with a citation to the Massachusetts Supreme Judicial Court affirmance; and also recites (paragraphs 7 and 8, Record, pages 38 and 39) the Massachusetts State court equity case, No. 81716, brought by the present corporate plaintiff against Raymond P. Gallagher, one of the present defendants, still pending when the answer was filed. (See for the papers in that case 176 F. Supp. 495-502, Record Supplement, pages 216-226.) The answer does not, in thus pleading these matters of defense, use the term "res judicata" or other appellation to charac-

terize them; nor was it necessary. Whatever legal effect the previous criminal and civil proceedings had was brought before the three-judge court by the recitals in the answer and in the stipulation hereafter described, and by the arguments of counsel, based thereon, presented to the court below.

A stipulation, signed by attorneys for plaintiffs and defendants in the present Federal case, and introduced in the case, recites the previous State criminal and injunction cases (Record, page 41).

When the present case came before the three-judge court, counsel for the Commonwealth vigorously urged these previous criminal proceedings as reasons why the complaint herein should be dismissed (Record, pages 52-55). His opponent mentioned the same case (Record, pages 88, 95) in his argument. Counsel for the Commonwealth discussed with the court the question whether the defense he was raising was technically *res judicata* or something analogous in the nature of estoppel (Record, page 53). Chief Judge Magruder said to counsel for the Commonwealth (Record, page 53): "Well, you seem to me to be making a statement that involves the concept of res adjudicata." Clearly the point was before the three-judge court.

As to the non-identity of parties in the three litigations concerned, it is true that the present individual plaintiffs first appear in the present Federal case, though, as the appellant contends, they have here no standing. However, the present corporate plaintiff, Crown Kosher Super Market of Massachusetts, Inc., was plaintiff in the State equity case, No. 81716. The complaint in that action asserted the substantial identity, for the purposes of this litigation, of Harold Chernock and the Crown Kosher Super Market of Massachusetts, Inc. The bill of complaint in that action

is captioned "Crown Kosher Super Market of Mass. Inc., alias Harold Chernock d/b/a Crown Market, Petitioner." See footnote 1 to dissent of Judge McCarthy, 176 F. Supp. 478, Record, page 150, and the bill in the State equity suit, reproduced 176 F. Supp. 495, Record Supplement, page 216. That bill recites:

> "The petitioner is Crown Kosher Super Market of Mass. Inc., . . . also known as Harold Chernock d/b/a Crown Market . . ."

The bill then describes the State criminal prosecution and continues:

> ". . . trial was had . . . and the petitioner found guilty . . . The Respondent has threatened that he will continue to make criminal complaints against your petitioner."

The only criminal defendant connected with the present litigation is thus described in the criminal papers as "Harold Chernock doing business as Crown Market." In equity case No. 81716 this name is treated as a convertible term for Crown Kosher Super Market of Massachusetts, Inc. Mr. Chernock, asked at the trial whether his market was open on Sunday, replied simply: "I am" (Record, page 12).

In the previous State injunction case the plaintiff could have raised whatever constitutional issues are open to the Crown Kosher Super Market here. Instead, the plaintiff chose, pending the State injunction case, to commence the present Federal suit and, five months later, to dismiss the State suit. The existence and issues of the previous criminal and civil litigation were thus all pleaded and discussed before the three-judge court in the present case, and the

substantial identity of the parties in the previous and present litigation (except for the customers and Rabbi) was established out of the admissions of Crown Kosher Super Market of Massachusetts, Inc., and its president and general manager. The customers and Rabbi, we say with respect, are too remote from the present case to have standing to sue. And the Crown Kosher corporation should be held bound by the previous litigation. The convictions in the criminal cases were affirmed by the Massachusetts Supreme Judicial Court; Mr. Chernock could have raised therein any defense he chose; he did choose to assert the State constitutional provisions concerning guaranties of freedom of religion (see his brief, set forth 176 F. Supp. 519, Record Supplement, page 208), including one—

> "No law shall be passed prohibiting the free exercise of religion."

That provision is substantially identical with the provision of the First Amendment, "incorporated" in the Fourteenth. In that criminal case, not only could the defendant have argued the effect of the Federal Constitution, but the defendant there did cite in the brief, and comment on, a note in the Yale Law Journal for March, 1952, entitled: "Sunday Statutes in a Modern Community". (61 Yale L.J. 427; see the reference in the defendant appellant's brief set forth 176 F. Supp. 520, Record Supplement, page 209). In the Yale Law Journal paper the United States Supreme Court holdings under the Federal Constitution, especially *People* v. *Friedman,* 302 N.Y. 75; affirmed, 341 U.S. 907 (1951), are discussed and analyzed. Clearly, in *Chernock* the appellant was conscious of the availability of an argument under the Fourteenth Amendment.

The substantial identity of interests and of persons between the corporate plaintiff here, the same plaintiff in the State equity case, and "Harold Chernock d/b/a Crown Market" in the State criminal case; the opportunity to raise the same issue of Federal constitutionality in the prior two cases; the argument of substantially the same question in the criminal case, all support the propriety of the motion to dismiss made below in the present case.

Cromwell v. *County of Sac*, 94 U.S. 351 (1876).
Grubb v. *Public Utilities Commission of Ohio*, 281 U.S. 470 (1930).
American Surety Co. v. *Baldwin*, 287 U.S. 156 (1932).

Even if the preceding litigation, criminal and civil, between the Commonwealth and Chernock and the Crown Kosher Super Market of Massachusetts, Inc., did not erect a fixed legal bar in the way of the corporate plaintiff, still the three-judge court, as a matter of reasonable deference to State jurisdiction, should have declined to accept Federal jurisdiction.

There remain difficulties in the construction of the State legislation in question, Massachusetts General Laws, chapter 136 (see argument of counsel for the plaintiffs, Record, page 96; and argument of the Assistant Attorney General, Record, pages 115, 116, 117). The State courts are the appropriate tribunals for that construction. *Harrison* v. *National Association for the Advancement of Colored People*, 360 U.S. 167 (1959).

In *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943), the Court wrote, at page 163:

> "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person

is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207; *Fenner* v. *Boykin*, 271 U. S. 240. Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury 'both great and immediate.' *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 95, and cases cited; *Beal* v. *Missouri Pacific R. Corp.*, 312 U. S. 45, 49, and cases cited; *Watson* v. *Buck*, 313 U. S. 387; *Williams* v. *Miller*, 317 U. S. 599."

Boynton v. *Fox West Coast Theatres Corp.*, 60 F. 2d 851 (C.C.A. 10, 1932), was an action, brought by the Fox Corporation in the District Court for the District of Kansas, seeking an injunction against enforcement of the State Sunday closing law. The complaint was based on the United States Constitution's Commerce Clause, and on discriminatory enforcement charged to be a denial of equal protection under the Fourteenth Amendment. The District Court granted an interlocutory injunction, but on

appeal the Circuit Court of Appeals for the Tenth Circuit reversed and ordered the bill dismissed. The court used language remarkably applicable to the case now at bar:

> "Finally, are plaintiffs entitled to equitable relief? It is a general rule that a court of equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. Fenner v. Boykin, 271 U. S. 240, 243, 244 . . . An exception to this general rule exists when the prevention of a threatened prosecution under an alleged unconstitutional enactment 'is essential to the safeguarding of rights of property, and when the circumstances are exceptional and the danger of irreparable loss is both great and immediate.' Cline v. Frink Dairy Co., 274 U. S. 445, 451, 452, . . .
>
> "But the attack on the constitutionality of the statute must be real and substantial and must at least present a fairly debatable question; the right alleged to be invaded or threatened must be clear (Truly v. Wanzer, 5 How. 141 . . . ; and facts from which it will appear that the circumstances are exceptional and the 'danger of irreparable loss is both great and immediate' must be clearly and fully set forth. Pittsburg, C., C. & St. L. Ry. Co. v. Board of Public Works, 172 U. S. 32, . . .
>
> "'An intolerable condition would arise, if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some federal court.' Fenner v. Boykin, supra.
>
> "Here, if we give the fullest force to the allegations of the amended complaint, the most that can be said is that plaintiffs will either have to close their

theaters on Sunday and lose the profits of Sunday operation, or submit to repeated prosecutions and the possibility of ultimate decrees of ouster against them. Have plaintiffs brought themselves within the exception to the general rule? If the attack on the constitutionality of the statute were predicated on substantial grounds, the question might be answered in the affirmative; but such is not the case. We have shown that, prior to the commencement of this suit, the Supreme Court of Kansas had sustained the validity of the statute and held that the operation of a motion picture theater on Sunday falls within its prohibition, and the Supreme Court of the United States had upheld the constitutionality of a similar statute, even when applied to those engaged in interstate commerce. Hennington v. Georgia, supra [163 U.S. 299 (1896)]. Such being the facts, while plaintiffs no doubt have the right to assert their alleged defenses, we are of the opinion that they should do so in the threatened criminal and quo warranto proceedings when brought, first in the state courts and then, if they are so advised, by seeking a review in the Supreme Court of the United States in the manner provided by the Judicial Code (see 28 USCA § 344); that in the meantime it will be their duty to obey the statute; and that they are not entitled to injunctive relief.

"We conclude that the bill is without equity and that plaintiffs are not entitled to the relief sought. It follows, notwithstanding this is an appeal from an interlocutory order, that this court has the power to consider this case on the merits and to direct a dismissal of the bill. Consolidated Cement Corp. v. Pratt (C. C. A. 10) 47 F.(2d) 90, 93.

"The decree is reversed and the cause remanded with instructions to dismiss the bill at plaintiffs' cost."

The circumstances of this *Boynton* case are so strikingly like those in the case at bar that detailing the analogy is superfluous. No crisis prevented the Crown Kosher Super Market from pursuing whatever remedy it might have in State courts first and then in the Supreme Court of the United States. As Mr. Chernock testified: "I never closed up . . . No, I did not . . . I never was" (Record, page 128).

If, as the appellant contends, the failure of the *alter ego* of the present corporate plaintiff—"Harold Chernock doing business as Crown Market"—to pursue his available remedies in the State criminal litigation now bars the corporate Market; if the present corporate plaintiff, by failure to persevere in its State court equity suit has made its loss of rights still more irretrievable; then the present case should be dismissed on a theory akin to collateral estoppel or *res judicata*. Federal constitutional rights can be irretrievably lost by failure to follow the right course in State procedure, as they were in *Central Union Telephone Co.* v. *City of Edwardsville*, 269 U.S. 190 (1925).

But, if the corporate plaintiff, Crown Kosher Super Market, still has State remedies with Supreme Court review available, the Federal District Court should decline to substitute its judgment of first instance for that of the Massachusetts courts.

On either theory, the present action should be dismissed.

b. Arguments Concerning the Effect of the Fourteenth Amendment in the Terms and Circumstances of this Case—Points VI-A to VI-F, Inclusive.

VI-A.

The Massachusetts Sunday Laws, Now General Laws, Chapter 136, Despite Religious Impulses in their Ancient Antecedents, by Passage of Time have Become a System of Lay Economic and Social Regulation, Providing a Uniform Day of Rest and Recreation in Each Week; their Constitutionality should be Judged with the Same Presumption of Validity as Other Social and Economic Legislation; So Judged the Legislation here Questioned is Clearly Valid.

While many "Sunday Laws," in the Thirteen Colonies, in the States generally, and in Massachusetts in particular, undoubtedly had religious connotations when first enacted, they have, through the years, come to constitute a system of provisions of the same general character as wage-and-hour laws or other laws guaranteeing that the pressures of work will not be unreasonably continuous, or burdensome on the people. The Massachusetts Supreme Judicial Court so held when this change in the basis of its Sunday legislation became relevant to the decision of a case. In *Commonwealth* v. *Has*, 122 Mass. 40 (1877), the defendant was charged with violation of the Massachusetts Sunday statute then in force, which forbade keeping open a shop "on the Lord's day." The defendant contended that, as applied to one, such as he, who conscientiously observed Saturday as his Sabbath, the Massachusetts statute was unconstitutional, in derogation of the Eleventh Amendment to the Constitution of the Commonwealth of Massachusetts, which provides: ". . . no subordination of any one sect or denomination to another shall ever be estab-

lished by law." The unanimous Supreme Judicial Court, speaking through Mr. Justice Devens, wrote (page 42):

"This act has been so frequently recognized in both civil and criminal cases, and its various provisions have been so often the subject of judicial decision, that its constitutionality can hardly be considered an open question. It is essentially a civil regulation, providing for a fixed period of rest in the business, the ordinary avocations and the amusements of the community. If there is to be such a cessation from labor and amusement, some one day must be selected for the purpose; and even if the day thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity, the legislative authority to provide for its observance is derived from its general authority to regulate the business of the community and to provide for its moral and physical welfare. The act imposes upon no one any religious ceremony or attendance upon any form of worship, and any one who deems another day more suitable for rest or worship, may devote that day to the religious observance which he deems appropriate. That one who conscientiously observes the seventh day of the week may also be compelled to abstain from business of the kind expressly forbidden on the first day, is not occasioned by any subordination of his religion, but because as a member of the community he must submit to the rules which are made by lawful authority to regulate and govern the business of that community.

"While in the Constitutions of many of the States of the Union there are, in different forms, provisions that no preference shall be given to one religion or form of religious belief, acts for the observance of the

first day of the week as a day of rest from labor have been repeatedly passed. In all of them, so far as we have been able to examine, the constitutionality of such acts has been sustained for reasons such as have been briefly stated above. *Specht* v. *Commonwealth*, 8 Penn. St. 312. *Frolickstein* v. *Mobile*, 40 Ala. 725. *Ex parte Andrews*, 18 Cal. 678, and cases cited.

"Exceptions overruled."

The *Has* case has been repeatedly cited and followed by the Supreme Judicial Court of Massachusetts. *Commonwealth* v. *Dextra*, 143 Mass. 28, 8 N.E. 756 (1886). *Commonwealth* v. *Starr*, 144 Mass. 359, 11 N.E. 533 (1887), and most recently in *Commonwealth* v. *Chernock* (three cases), 336 Mass. 384, 145 N.E. 2d 920 (1957), which involved Mr. Harold Chernock, who is president, general manager, and half-owner of the corporate plaintiff in the present litigation. The nature of Massachusetts Sunday closing legislation pronounced in the *Has* case was reinforced by a most recent expression of a Massachusetts public body on the nature of the Sunday legislation of that Commonwealth. The Legislative Research Council, pursuant to Omnibus Senate Order 657 of 1959, submitted to the Massachusetts Senate on February 24, 1960, a report including a discussion of the subject. By Order 657 the Massachusetts Legislative Research Council had been directed ". . . to make an investigation and study . . . relative to the laws relating to legal holidays and their observance; . . ." In the report so made, the Legislative Research Council observes, under the heading "Objectives of Sunday Legislation":

"In general, Sunday laws protect the public by guaranteeing one day in seven to provide a period of

rest and quiet. Health, peace, and good order of society are thereby promoted. Such provision is essentially civil in character and the statutes are not regarded as religious ordinances."

The majority opinion of the three-judge District Court below passes lightly over the *Has* case, 122 Mass. 40 (1877), by stating that the Federal District Court need not accept the *Has* characterization of the Massachusetts Sunday closing laws as a non-religious "civil regulation, providing for a fixed period of rest . . ." But, on the contrary, Massachusetts State judges are best equipped to determine the true character of Massachusetts legislation. The underlying reason for *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), applies here. The District Court cites *Society for Savings in the City of Cleveland* v. *Bowers*, 349 U.S. 143 (1955), as its authority for not accepting the characterization of Massachusetts legislation by the Massachusetts Supreme Judicial Court. *Society for Savings in the City of Cleveland* v. *Bowers* involved a claim of exemption of Federal bonds from State taxation. The Ohio courts held that the tax was "on" the intangible property interests of depositors. The Supreme Court of the United States, on appeal, stated: "We must judge the true nature of this tax in terms of the rights and liabilities which the statute, as construed, creates" (page 151); and held the tax to be "on" the banks themselves (page 154). This is, however, not a holding that a Federal court may disregard a State court construction of a statute as a lay commercial regulation. Still less may a Federal court derive its conclusion from an amicus brief, not connected with the Commonwealth; the three-judge court below, however, refers to a brief of two religious

organizations as having "let the cat out of the bag" (see 176 F. Supp. 474, Record, page 144).

The Massachusetts Sunday closing laws are thus held by Massachusetts courts, as the Sunday closing laws of other States have been held by their courts, to be lay economic and social regulations, intended to protect working people against the pressure, exerted by competition, to give up the common day-off they wish to enjoy with families, relatives and neighbors.

The opinion of the majority of the three-judge court herein characterizes the statement by the Massachusetts Supreme Judicial Court in *Commonwealth* v. *Has*, 122 Mass. 40, 42 (1877), that the Sunday law is "essentially a civil regulation," as "an *ad hoc* improvisation," and states that an amicus brief filed by the Lord's Day League of New England and the Archdiocesan Council of Catholic Men "lets the cat out of the bag." On the contrary, an examination of the multitude of adjudications on Sunday law discloses that many courts repeat in many different cases the same themes which occur in the *Has* case. Through the adjudications runs the holding that Sunday closing legislation, which two and three centuries ago had mainly religious connotations, now provides for a day of rest and recreation. Associated with this is frequently a statement that the fact that many people regard this day as one for religious exercises does not prohibit the Legislature from selecting this day for a day of rest and recreation. Such statements occur in the frequently cited case of *Ex parte Andrews*, 18 Cal. 678 (1861). That case was decided, of course, before the Fourteenth Amendment. The defendant had been convicted for keeping open his store on Sunday in violation of a California statute, and he unsuccessfully sought habeas corpus on the ground that the statute was in conflict with a "freedom of religion" clause of the State Constitution. Judge Baldwin, with

Chief Justice Field and Associate Justice Cope concurring, wrote:

> "It is said besides that this law affords indirectly protection against oppression to employees, women, apprentices, and servants; and that but for the law, men would keep open stores and shops because their neighbors did so, and that by competition a sort of compulsion exists to violate the laws of health."

The *Andrews* case has become a classic in this branch of the law, repeatedly cited in succeeding cases which followed it.

The same proposition is stated by Mr. Justice Harlan, delivering the opinion of the Supreme Court of the United States in *Hennington* v. *Georgia*, 163 U.S. 299 (1896). The Court there rejected a contention that a Georgia statute which forbade the running of freight trains on Sunday was unconstitutional because of conflict with the Commerce Clause. He wrote (at page 304):

> "It is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty. The legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it was within its discretion to fix the day when all labor, within the limits of the State, works of necessity and charity excepted, should cease. It is not for the judiciary to say that the wrong day was fixed, much less that the legislature erred when it assumed that the best interests of all required that one day in seven should be kept for the purposes of rest from ordinary labor."

The Court adds at page 307:

"Doubtless it is a religious duty to pay debts, but no one supposes that this is any obstacle to its being exacted as a civil duty. With few exceptions, the same may be said of the whole catalogue of duties specified in the Ten Commandments. Those of them which are purely and exclusively religious in their nature cannot be, or be made civil duties, but all the rest of them may be, in so far as they involve conduct as distinguished from mere operations of mind or states of the affections. Opinions may differ, and they really do differ, as to whether abstaining from labor on Sunday is a religious duty; but whether it is or is not, it is certain that the legislature of Georgia has prescribed it as a civil duty."

See, to a similar effect, *Broad-Grace Arcade Corp.* v. *Bright*, 48 F. 2d 348 (D.C. E.D. Va. 1931); affirmed per curiam, 284 U.S. 588 (1931).

The argument is sometimes heard that the Legislature, if it wished merely to provide one day in seven, could have contented itself as the Massachusetts Legislature has in chapter 149, section 48, of the General Laws, by providing that everyone shall have one day in rest in every seven, without specifying the day. The necessity for such a statute becomes apparent when it is remembered that many establishments in Massachusetts are permitted to remain open seven days a week. The druggist is an example; the licensed pharmacist on duty in a Massachusetts drugstore is entitled to one day in seven in which he can rest even though the store where he works may be open seven days a week. But this does not accomplish what a specified common day of rest will accomplish.

Where more than one member of a family is employed, they will often wish to have the same day off for joint recreation. A man whose children are in school from Monday through Friday would have few opportunities to go to the beach with his entire family for a day if his day off were on, say, Wednesday. A young man employed in a factory who wishes to take a girl for an afternoon ride will find this difficult if his day off is Tuesday and hers is Thursday. The Fourteenth Amendment surely does not forbid a State Legislature to select Sunday for the common day off, simply because a number of members of the public, though by no means all, regard it as a day of religious obligation.

No one would suggest that present-day Russia is a country apt to introduce legislation "establishing a religion." And indeed in 1929, when continuous industrial production was desirable, a "five-day week" (four work days and one day off), with rotation of day schedules, was introduced. In certain trades a six-day week (five work days, one day off) was used. As this plan was administered, one man might have his day off on Tuesday and another on Wednesday. (For a discussion of this matter see Schwarz, "Labor in the Soviet Union," 1952, pages 268-299.) Employees on the whole resented the innovation. Schwarz quotes a reporter writing in "Pravda" of October 1, 1929:

> "What do we have our families for? Are we to get no rest at all? What are we to do at home if the wife is in the factory, the children in school and no one can come to see us? What is left but to go to the public tearoom? What kind of life is that—when holidays come in shifts and not for all workers together? That's no holiday if you have to celebrate by yourself?"

On June 26, 1940, by decree of the Praesidium of the Supreme Soviet of the U.S.S.R. it was decided—

> "To change work, in all state, cooperative, and public enterprises and institutions, from a six-day week to a seven-day week, considering the seventh day—Sunday—as a day of rest."

See Bulletin of the Supreme Soviet of the U.S.S.R. (Vedomosti Verkhovno Soveta CCCP), No. 20(83), 5 July, 1940, page 1, column 1.

In short, when the majority of the three-judge court below in its opinion (176 F. Supp. 466, Record, page 145) writes that what Massachusetts has done in the statute is to furnish special protection to the dominant Christian sects which celebrate Sunday as the Lord's Day it is ascribing what today is an incident to, but not the principal character of, Sunday as a day off from work.

If then, as the Massachusetts and many other Federal and State courts have held, Sunday closing laws are lay provisions for a day off from work, when the constitutionality of such Sunday closing laws is challenged under the Fourteenth Amendment the question should be judged with every presumption in favor of constitutionality. The day of *Lochner* v. *New York*, 198 U.S. 45 (1905), is over; "economic due process" questions are now decided under the presumption of validity developed in *Nebbia* v. *New York*, 291 U.S. 502 (1934), and *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937).

When denial of equal protection under the Fourteenth Amendment is alleged, the Supreme Court of the United States will seek reasons to justify the classification and differentiation of treatment prescribed in the challenged law. The process of judging does not require, or permit,

an empiric inquiry into the motivation of each legislator who voted for a statute, or of the Governor who approved it. The question is whether reasonable legislators might have had some rational purpose, and a court will seek in its own experience and knowledge for such an attributed legislative intent.

This phase of the judicial process was described in 1911 by Mr. Justice Van Devanter, writing the opinion of the unanimous Supreme Court in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61. In that case the Supreme Court affirmed a decree of the Federal Circuit Court for the Southern District of New York. The decree so affirmed had refused to enjoin a New York statute enacted to safeguard natural mineral springs against waste and impairment. The party seeking the injunction contended that the statute violated the Equal Protection Clause of the Fourteenth Amendment. The Court, describing "The rules by which this contention must be tested" (page 78), stated:

> "When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." (Page 78.)

This principle of constitutional reasoning has been applied by the United States Supreme Court in a number of comparatively recent cases to uphold State legislation. This Court sustained the Michigan Barmaids Law in *Goesaert* v. *Cleary*, 335 U.S. 464 (1948), against the contention that no reasonable justification permitted classification of daughters of female owners of bars with those women forbidden to tend bar, while permitting this employment to

daughters of male owners. This Court found a conceivable legislative justification in the superior, protective oversight of a male relative. The Louisiana pilots' case, *Kotch* v. *Board of River Port Pilot Commissioners for the Port of New Orleans*, 330 U.S. 552 (1947), offers another example. In *Railway Express Agency, Inc.*, v. *New York*, 336 U.S. 106 (1949), the Supreme Court upheld a statutory distinction between advertising on vehicles owned by the seller of the product advertised and advertising on vehicles otherwise owned. In *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), this Court upheld an Oklahoma statute exempting sellers of ready-to-wear eyeglasses from a regulatory system covering other eyeglass and frame selling. In short, this Court will uphold differentiation in economic or commercial regulation if there is any conceivable rationality in the distinction.

In the case at bar the Massachusetts Legislature has made a distinction between certain business activities which it has, on the one hand, considered essential to public safety and welfare, or conducive to wholesome recreation and amusement, and, on the other hand, those business activities which it has chosen to suspend on Sunday so that employees may have a common day off. It has made a distinction between foods generally on the one hand and on the other foods it deems essential, such as milk (chapter 136, section 6) or which may have a holiday flavor, such as frozen desserts (chapter 136, section 6).

It distinguishes between foods less apt to spoil, and fresh meat, which requires special supervision and attention. The Massachusetts Legislature has elsewhere made particular and elaborate provisions for inspection of fresh meat when slaughtered and when sold at retail. See General Laws, chapter 94, section 118 *et seq.*, especially sections 127 and 147, which provide for co-ordination of such

inspectoral activity by State and local officers with similar activity by the United States Department of Agriculture. See also the Federal Meat Inspection Act, Title 21, United States Code, section 71 *et seq.* See also Massachusetts General Laws, chapter 94, sections 129 and 130, forbidding sale or possession for sale of unstamped meats; section 147, providing for inspection of meat and other foods offered for sale. The Legislature, recognizing the likelihood that meat may be unwholesome unless the precautions so provided are carried out, may well have reconciled the need for Sunday rest of the staff of inspectoral officers with the wish of the public for meat for Sunday dinner by limiting the hours when fresh meat may be sold on Sundays to the early part of the day, ending at 10 o'clock a.m. See *Osborn* v. *Ozlin*, 310 U.S. 53 (1940), at page 64. Is a court to find this an unconstitutional reconciliation of diverse public needs and wishes?

VI-B.

Saturday Sabbatarian Closing is Not Imposed by State Action; its Consequences do Not Call into Effect the Fourteenth Amendment.

The Fourteenth Amendment Due Process and Equal Protection Clauses tell only what a State shall not do. Religious scruples, or the urging of an organized religious body, which closes a businessman's store on Saturday, or which inhibits purchasers from buying food if it is elsewhere available on Saturday, is not attributable to the State. Massachusetts applies its Sunday closing laws to all alike, save for some concessions to Saturday sabbatarians in General Laws, chapter 136, section 6. Non-governmental persuasion, operating on the management of Crown Kosher Super Market and on those members of its

clientele who are religiously scrupulous, does give one business day less in each week to the orthodox Hebrew than it does to the person not of that religion. But that non-governmental persuasion to observe Saturday as a Sabbath does not license Saturday sabbatarians to disregard the Sunday restrictions which limit the rest of the community. Religious scruples do not license affirmative activity forbidden by otherwise binding law. A recent example is *Kissinger* v. *United States*, 250 F. 2d 940 (C.A. 3, 1958). There a farmer entertaining religious scruples against limiting the productivity of his acres produced wheat, and marketed it, in excess of a quota imposed on him under the Agricultural Adjustment Act. The United States sued to recover the statutory penalties; Kissinger attempted a defense under the First Amendment, contending that the Act, as applied to him, interfered with his exercise of a religious duty. This defense failed in the District Court; the Court of Appeals for the Third Circuit affirmed unanimously. Maris, J., wrote (see 250 F. 2d at page 943):

> "... the freedom of religion guaranteed by the First Amendment does not include freedom from all regulation of an individual's acts and conduct as contradistinguished from his beliefs. On the contrary, the enforcement of a reasonable nondiscriminatory regulation of conduct by governmental authority to preserve peace, tranquility and a sound economic order does not violate the First Amendment merely because it may inhibit conduct on the part of individuals which is sincerely claimed by them to be religiously motivated. Davis v. Beason, 1890, 133 U.S. 333, 342-345; Prince v. Commonwealth of Massachusetts, 1944, 321 U.S. 158, 163-171; Poulos v. State of New Hampshire, 1953, 345 U.S. 395, 405; Mitchell v. Pilgrim Holi-

ness Church Corp., 7 Cir. 1954, 210 F.2d 879, 884-885, certiorari denied 347 U.S. 1013.

"The judgment of the district court will be affirmed."

The Supreme Court denied certiorari, 356 U.S. 958 (1958).

VI-C.

The United States Supreme Court, Affirming or Dismissing Appeals from a Long Series of Lower Court Cases Upholding the Sunday Closing Laws of Many States, has Recognized their Character as Social and Economic Legislation, and has Consistently Rejected Arguments that Such Legislation is Unconstitutional, either on Religious Freedom Grounds, or on Grounds of Equal Protection and Due Process.

In a consistent series of cases beginning in 1896 and continuing down to the present time the Supreme Court of the United States has affirmed State or lower Federal court judgments upholding Sunday closing laws as social regulations, or has dismissed appeals from such judgments on the ground that no substantial Federal question was presented.

California:

In 1885 the Supreme Court affirmed the refusal of the United States Circuit Court for the District of California to issue a writ of habeas corpus to one Soon Hing. Hing had been arrested for keeping his laundry open during the night-time, in violation of a San Francisco ordinance which also forbade Sunday laundering. As there was no charge of a Sunday violation, the Sunday closing feature of the

ordinance was not directly involved; but Mr. Justice Field, writing the opinion for affirmance, wrote:

> "Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficient and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States."

Soon Hing v. *Crowley*, 113 U.S. 703, 707, 710 (1885). That opinion has since been widely accepted and cited as justifying the constitutionality of Sunday closing laws.

Georgia:

In 1896 a Georgia statute restricting the running of freight trains on Sunday was upheld by the United States Supreme Court in *Hennington* v. *Georgia*, 163 U.S. 299. The defendant, a railroad executive, in a State prosecution had unsuccessfully set up the Commerce Clause of the Federal Constitution as a defense. His conviction was affirmed by the Supreme Court of Georgia, and was again affirmed by the Supreme Court of the United States.

Mr. Justice Harlan wrote the Court's opinion in *Hennington* v. *Georgia*. Of the character of the Georgia statute he wrote (see 163 U.S. at pages 303-304):

> "In what light is the statute of Georgia to be regarded? The well-settled rule is, that if a statute purporting to have been enacted to protect the public

health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution. *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Minnesota* v. *Barber*, 136 U. S. 313, 350.

"In our opinion there is nothing in the legislation in question which suggests that it was enacted with the purpose to regulate interstate commerce, or with any other purpose than to prescribe a rule of civil duty for all who, on the Sabbath Day, are within the territorial jurisdiction of the State. It is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty. The legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it was within its discretion to fix the day when all labor, within the limits of the State, works of necessity and charity excepted, should cease. It is not for the judiciary to say that the wrong day was fixed, much less that the legislature erred when it assumed that the best interests of all required that one day in seven should be kept for the purposes of rest from ordinary labor. The fundamental law of the State committed these matters to the determination of the legislature. If the law making power errs in such matters, its responsibility is to the electors, and not to the judicial branch of the government. The whole theory of our government, Federal and state, is hostile to the idea that questions of legislative authority may depend upon expediency, or upon opinions of judges as to the wisdom or want of wis-

dom in the enactment of laws under powers clearly conferred upon the legislature. The legislature of Georgia no doubt acted upon the view that the keeping of one day in seven for rest and relaxation was 'of admirable service to a State, considered merely as a civil institution.' 4 Bl. Com. #63. . . ."

Minnesota:

In 1900 a unanimous Supreme Court, affirming the Supreme Court of Minnesota, in *Petit* v. *Minnesota,* 177 U.S. 164, upheld a Sunday closing statute specifying barbering as not within the familiar charity and necessity exception to a comprehensive Sunday closing law. Mr. Chief Justice Fuller, in the opinion of the Supreme Court of the United States, wrote of cessation from labor as—

". . . a rule of conduct, which the entire civilized world recognizes as essential to the physical and moral well-being of society," and added, "Well-nigh innumerable decisions of the state courts have sustained the validity of such laws." (Page 165.)

Virginia:

A corporation operating a miniature golf course sought to enjoin the enforcement of a Sunday closing statute, relying upon Fourteenth Amendment arguments. A three-judge Federal District Court in 1931 denied an interlocutory injunction, stating that, although the statute could not be enforced were it a religious observance, its aim was in fact to prevent the ills of uninterrupted labor. *Broad-Grace Arcade Corp.* v. *Bright,* 48 F. 2d 348 (D.C. E.D. Va. 1931). In the United States Supreme Court the order denying the interlocutory injunction was affirmed *per*

curiam, "but without prejudice to the power and duty of the District Court, as specially constituted, to inquire and determine whether the court has jurisdiction . . . both in relation to the amount involved in the controversy . . . and with respect to the right of the complainant to maintain this suit in equity . . ." 284 U.S. 588 (1931).

New York

The New York Court of Appeals, in *People* v. *Friedman*, 302 N.Y. 75, 96 N.E. 2d 184 (1950), was concerned with New York legislation strikingly like that of Massachusetts. The New York legislation originated in the 17th century, and at that time reflected a religious impulse. By 1950 it had been denominated "Penal Law, Article 192-Sabbath"; it contained a general prohibition of Sunday labor, save for works of necessity and charity; it contained various specific prohibitions of Sunday trades; and there were numerous specific exceptions to the prohibitions. The two defendants were charged with and convicted of public selling and offering for sale uncooked meat in violation of the statute. They appealed to the New York Court of Appeals, which *per curiam* affirmed the conviction. The *per curiam* opinion included the following (see 302 N.Y. 75, 79, 96 N.E. 2d 184, 186):

> "Nor may we say that s 2147 of the Penal Law is unconstitutional because of infringement upon religious freedom. It is not a 'law respecting an establishment of religion, nor prohibiting the free exercise thereof' (U.S. Const., 1st Amendt.). It does not set up a church, make attendance upon religious worship compulsory, impose restrictions upon expression of religious belief, work a restriction upon the exercise of religion according to the dictates of one's own con-

science, provide compulsory support, by taxation or otherwise, of religious institutions, nor in any way enforce or prohibit religion. Although the so-called Sunday laws may be said to have had a religious origin, our statute since 1881 (Penal Code, s 259, now Penal Law, s 2140) has also recognized that the first day of the week by general consent is set apart 'for rest', in accord with the general experience of mankind that it is wise and necessary to set apart such a day at stated intervals for both the physical and moral welfare of the members of a State or community. The power of the Legislature to regulate the observance of Sunday as a civil and political institution is well settled. (*Soon Hing* v. *Crowley*, 113 U.S. 703, 710; *Hennington* v. *Georgia*, 163 U.S. 299, 314, 317; *Petit* v. *Minnesota*, 177 U.S. 164, 165.)"

The defendants sought review in the Supreme Court of the United States. Their statement of jurisdiction shows that their appeal presented the question whether the New York Sabbath Law was "a law respecting an establishment of religion," invalid under the First Amendment, "made applicable to the States by the Fourteenth Amendment"; whether the New York statute unconstitutionally denied freedom of religion because of its failure to exempt persons recognizing a day other than Sunday as a "holy day of rest"; whether the New York Sabbath law by reason of what the appellants there called a "crazy quilt" pattern of inclusions and exclusions, arbitrary, discriminatory, therefore denying equal protection and due process under the Federal Constitution; and finally whether the New York Sabbath Law was discriminatorily applied against the defendants and persons similarly sit-

uated, thus violating the equal protection guaranties of the Federal Constitution. The Supreme Court of the United States dismissed the appeal without opinion. *Friedman* v. *People of New York*, 341 U.S. 907 (1951). Such a dismissal is a disposition on the merits of the case, and an authoritative precedent. See *Ohio, ex rel. Eaton* v. *Price*, 360 U.S. 246, 247 (1959); *Baskin* v. *Industrial Accident Commission*, 338 U.S. 854 (1949); and other authorities cited by the Court in *Two Guys from Harrison-Allentown, Inc.*, v. *McGinley*, 179 F. Supp. 944 (D.C. E.D. Pa. 1959) at page 949, footnote 4.

North Carolina:

In 1953 the Supreme Court of North Carolina affirmed a conviction of one McGee for operating a drive-in moving-picture theater during hours prohibited on Sunday by a municipal ordinance. McGee in his unsuccessful defense set up the Fourteenth Amendment, arguing that the ordinance imposed invalid classification; it was "arbitrary and unreasonable"; and that it conflicted with the First Amendment. The State Supreme Court discussed and rejected all these contentions, stating, of the religious argument:

> "It so happens that the great majority of people desire to observe Sunday as the day of rest. And measures for its observance do not come from a desire to impose upon the conscience of the individual, but rather to promote public health, the general welfare, safety and morals of the people and to give them an opportunity to rest from their secular activities. . . . And the fact that an ordinance may require the cessation of secular pursuits on Sunday during

the hours in which church going people usually attend religious services, will not be held unconstitutional, if otherwise reasonable and valid."

State v. *McGee*, 237 N.C. 633, 644, 75 S.E. 2d 783, 790 (1953). The Supreme Court of the United States dismissed the defendant's appeal with a *per curiam* notation of the want of a Federal question. *McGee* v. *North Carolina*, 346 U.S. 802 (1953). A similar result occurred in *State* v. *Towery*, 239 N.C. 274, 79 S.E. 2d 513 (1954); appeal dismissed for want of a substantial Federal question, 347 U.S. 925 (1954).

New Jersey:

In 1956 the Supreme Court of New Jersey, in *Gundaker Central Motors, Inc.*, v. *Gassert*, 23 N.J. 1, 127 A. 2d 566, upheld a statute requiring automobile dealers to close on Sunday. The opinion described the economic and social background of the legislation. The Supreme Court of the United States dismissed an appeal for want of a substantial Federal question. *Gundaker Central Motors, Inc.*, v. *Gassert*, 354 U.S. 933 (1957).

Ohio:

In 1958 the Supreme Court of Ohio affirmed a series of convictions of that State's Sunday closing legislation. That Court rejected a religious argument, and found Sunday legislation a provision for a day of rest, requisite for moral and physical well-being. *State* v. *Kidd*, 167 Ohio State 521, 150 N.E. 2d 413; appeal to Supreme Court of United States dismissed for want of a substantial Federal question, 358 U.S. 132 (1958).

Pennsylvania:

In 1958 the Supreme Court of the United States also dismissed for want of a substantial Federal question an appeal from the Superior Court of Pennsylvania, which had affirmed a lower court conviction for showing motion pictures at a drive-in theatre. The State opinion dealt with questions of free expression, due process, and unreasonable classification. *Commonwealth of Pennsylvania* v. *Grochowiak,* 184 Pa. Super. 522, 136 A. 2d 145 (1957); appeal dismissed for want of a substantial Federal question, 358 U.S. 47 (1958).

Note: for the sake of completeness, two other cases should be cited in which the Supreme Court of the United States dismissed appeals from lower court judgments upholding the constitutionality of Sunday legislation. After the New York Court of Appeals upheld a conviction for Sunday barbering despite Fourteenth Amendment arguments of unequal protection, in *People* v. *Havnor,* 149 N.Y. 195, 43 N.E. 541 (1896), the barber's writ of error in the Supreme Court of the United States was dismissed because the writ of error was not allowed by the Chief Judge of the State court. 170 U.S. 408 (1898). And in *Brunswick-Balke-Collender Co.* v. *Evans,* 228 Fed. 991 (D.C. D. Ore. 1916), a three-judge United States District Court refused to enjoin an Oregon Sunday closing law despite the plaintiff's arguments, under the Fourteenth Amendment Due Process and Equal Protection Clauses, that freedom of religion was impaired and that classification of occupation was arbitrary. The plaintiff appealed to the Supreme Court of the United States, which in 1918 dismissed the appeal on the appellees' motion, 248 U.S. 587, no one opposing. The official edition, United States Reports, lists this dismissal under "Cases disposed of without consideration by the Court."

VI-D.

The Sunday Closing Legislation in Massachusetts, General Laws, Chapter 136, as Applied to Defendant Crown Kosher Super Market of Massachusetts, Inc., is Not Unreasonable, in Classification or Otherwise, and does Not Contravene the Equal Protection or Due Process Clauses; the Wide Adoption of Such Legislation in the Various States and Elsewhere, and its Constitutional Approval by the Vast Majority of State Courts; so Demonstrates.

The Federal Constitution, Acts of Congress and legislation of various sorts in the fifty States and in Puerto Rico make special provisions for Sunday as a "day off." The vast majority of courts before whom such legislation has come have held it constitutional as social and economic regulation. Similar legislation exists in other countries. This widespread consensus of opinion demonstrates the reasonableness of legislation making Sunday a "day off," on which people can rest and seek amusement, away from pressure to work. It similarly demonstrates the wide concurrence of agreement that reasonable exceptions to the application of the statutes are within the legislative discretion.

Muller v. *Oregon*, 208 U.S. 412 (1908), established the usefulness, in demonstrating the constitutionality and reasonableness under the Fourteenth Amendment canon, of legislation regulating periods of work. The opinion of the United States Supreme Court, unanimously upholding an Oregon ten-hour-day law for women, commented on the brief filed by Mr. Louis D. Brandeis for the State of Oregon, which cited similar legislation in a long list of States, and in foreign countries. It also cited reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, etc. See 208 U.S. 419, 420.

Of some of this material Mr. Justice Brewer wrote for the unanimous Court (pages 420, 421):

> "The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."

Analysis of widespread Sunday legislation in the United States and elsewhere:

Sunday legislation provisions can be classified in five principal types. A common sort of provision excepts Sunday from days on which governmental action can be taken, or on which legal steps are required to preserve rights. An example is section 85 of the Uniform Negotiable Instruments Law, making an instrument which by its terms

is due on Sunday come due on the next business day. Another type of statute suspends civil process on Sunday; courts are often directed not to sit. Article I, section 7, clause 2, of the Constitution of the United States gives the President ten days "(Sunday excepted)" to study an Act of Congress in order to decide on a possible veto. Some legislation of this category occurs in every one of the fifty States. It is so common, and so universally accepted, that we do not attempt to include it in the tabulation in Appendix B.

Another common type, found in thirty-four States and in Puerto Rico, is termed "comprehensive prohibition" in Appendix B of this brief. Such legislation very frequently coexists with other types. The "comprehensive prohibition" in Massachusetts, fairly typical of the thirty-three other States and Puerto Rico, is General Laws, chapter 136, section 5:

> "Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars."

In forty-six States occur various "specific prohibitions," often coexisting with comprehensive prohibitions, as Appendix B demonstrates. Some of Massachusetts' specific prohibitions occur in General Laws, chapter 136, sections 2 and 3, which prohibit Sunday participation in various games, public diversions and entertainments. See Appendix A to this brief, pages 80 to 81, where General Laws, chapter 136, is set forth in full.

In twenty-two States occur what in Appendix B are denominated "Sabbatarian exemptions," which grant some

legal leeway in the application of its Sunday laws to those who observe some day other than Sunday as a Sabbath. Massachusetts has a provision of this type, in a portion of the long and complex section 6 of chapter 136 of the General Laws:

> ". . . Nor shall it [referring to the comprehensive prohibition of the preceding Section 5] prohibit . . . the selling or delivering of kosher meat by any person who, according to his religious belief, observes Saturday as the Lord's day by closing his place of business during the day until six o'clock in the afternoon, or the keeping open of his shop on the Lord's day for the sale of kosher meat between the hours of six o'clock and ten o'clock in the forenoon.
>
> "Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby, . . ."

In forty-one States occur what Appendix B terms "Essential and Recreational Exceptions." These grant dispensations from what would otherwise be Sunday restrictions. They permit such essential activities as the sale of medical supplies or the maintenance of electric light service; and allow such recreational activities as may add pleasure and gaiety to the day off for those released from pressure to work by the wider prohibitions of Sunday business. Massachusetts examples occur in chapter 136, section 6, which permits a long list of Sunday activities of this character—live bait can be sold for the man out for a Sunday's fishing; the Sunday ride in the family car on

country roads can be enlivened by a stop at a roadside stand where a farmer sells his home-grown apples or pumpkins. Such exceptions inevitably involve nice legislative distinctions. The Massachusetts legislator had to decide whether commercial pressure on employees of gasoline sellers to work on Sunday was compensated for by the convenience and pleasure Sunday gasoline would give to automobilists and motor-boaters.

Reasonable men may differ as to the policy of some such classifications but such differences of judgment do not rise to the point of unconstitutionality under the Equal Protection Clause of the Fourteenth Amendment. Litigants in the many attempts to invalidate Sunday laws have frequently pointed out the small difference which thus separates the forbidden from the permissible. The opinion of Chief Judge Magruder in the present case comments on the fact that Sunday clam-digging is permitted in Massachusetts while Sunday oyster-dredging is forbidden (176 F. Supp. 476, footnote 4, Record, page 147). Judge McCarthy in his dissent points out (176 F. Supp. 489, footnote 6, Record, pages 168, 169) that clams are dug for sport at low tide, while oyster-dredging is characteristically commercial. This sort of distinction should not be reviewed and reversed by the judiciary even if judges differ from the legislators as to the substantiality of the difference of circumstances.

Such fine distinctions in legislation are inevitable at the point where two conflicting policies meet and the legislators have to make specific choices. When twenty years of adverse possession cuts off a landowner's rights, the policy difference between nineteen years and three hundred and sixty-four days on the one hand, and the full period of twenty years on the other, becomes difficult to see. But legislators have to run a line; and there is a justification in the policy that a line be drawn.

Sunday closing legislation has, of course, long been familiar in countries other than the United States. See, *e.g.*, Holmested, The Sunday Law in Canada (1912), and English history of Sunday laws discussed therein. Prior to 1940 the Soviet Union experimented with every fifth and every sixth calendar day of rest. In 1940 it restored Sunday as the general day of cessation of labor. Bulletin of the Supreme Soviet of the U.S.S.R. (Vedomosti Verkhovno Soveta CCCP), No. 20(83), 5 July, 1940, page 1, column 1.

State adjudication upholding reasonableness of Sunday legislation:

In thirty-nine States, in Puerto Rico and in the District of Columbia there are appellate or highest State court decisions or three-judge Federal court decisions holding Sunday legislation valid despite attack on State or Federal constitutional grounds.[1] From ten States one or more appeals from such judgments of validity have been taken to the Supreme Court of the United States, which has in each case either affirmed the lower court or dismissed the appeal—in two such cases dismissing without reaching any question involving merits.

In fifteen of these thirty-nine States, and in one other (Arizona) there have been, at one time or another, State court holdings that some Sunday statute or municipal or-

[1] Alabama, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming. See Appendix B for case names.

dinance was invalid.[2] In only one of such States (prior to the decision of the District Court herein) has a Sunday closing law ever been held unconstitutional on religious grounds (unless mention should also be made of *Commonwealth* v. *Cavalerro*, Court of Quarter Sessions, Philadelphia County, Pa., April 20, 1960, apparently unreported). In 1858 the Supreme Court of California held a Sunday closing law invalid under a clause in the State Constitution forbidding religious "discrimination or preference." See *Ex parte Newman*, 9 Cal. 502 (1858). Three years later this case was overruled in *Ex parte Andrews*, 18 Cal. 678 (1861), with an opinion rejecting Chief Justice Terry's opinion in the earlier case, and adopting the prior dissent of the then Associate later Chief Justice Field.

In none of the other sixteen States has there ever been a State Supreme Court or Federal court holding that a Sunday law was unconstitutional either under a State or under the Federal Constitution on religious grounds, until the judgment of the Federal District Court in the case at bar. An annotation in the Rocky Mountain Law Review wrote of the *Crown Kosher* decision below herein in the three-judge court: "The *Crown Kosher* decision now stands as an isolated judicial monument—a constitutional holding unparalleled since *Ex parte Newman* decided over a century ago." 32 Rocky Mountain Law Review, 243, 245 (1960). No holding in any one of those sixteen states invalidates a whole Sunday closing program. Arizona held a municipal ordinance of Yuma invalid because inconsistent with the general State Sunday law.[3] Ten-

[2] Arizona, California, Colorado, Florida, Illinois, Indiana, Missouri, Nebraska, New Jersey, New York, North Carolina, Oklahoma, Oregon, Tennessee, Utah, Washington. See Appendix B for cases.

[3] *Elliott* v. *State*, 29 Ariz. 389, 242 P. 340 (1926).

nessee held invalid a State statute because two subjects (barbering and bath-houses) were included in the same statute, contrary to a State constitutional provision. New Jersey, Missouri, Indiana and other states have held invalid specific provisions on the ground that they were so limited in their application as to conflict with State constitutional prohibitions against "special acts" or "special legislation."[4] Some of the rest of these fifteen cases go off on "improper" classification without specifying whether the court is considering a State or the Federal Constitution. It is often impossible to tell from the opinion which is meant. The tendency of some State courts to decide more rigorously against economic legislation than the United States Supreme Court would do has been the subject of some recent comment. See A. M. Horn, "Judicial Power over Policy under State Constitutions," VI Public Policy, Galbraith and Friedrich, Eds., 1956; and R. V. Carpenter, "Economic Due Process and the State Courts," 45 Amer. Bar Ass'n Journal 1027 (Oct. 1959).

Florida came closest to a sweeping invalidation of Sunday closing laws in decisions in 1952 and 1957.[5] Even these adjudications left in force some specific prohibitions, and the Florida Legislature in 1959 passed a new law forbidding Sunday sales of automobiles, reciting in its text economic justifications on non-religious grounds of convenience and safety.[6] In all sixteen States except Florida

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[4] *Sarner* v. *Union Township, Union County*, 55 N.J. Super. 523, 151 A. 2d 208 (1959). *McKaig* v. *Kansas City*, 363 Mo. 1033, 256 S.W. 2d 815 (1953). *Armstrong* v. *State*, 170 Ind. 188, 84 N.E. 3 (1908). See the tabulation in Appendix B *passim*.

[5] *Henderson* v. *Antonacci*, 62 So. 2d 5 (1952); and *Kelly* v. *Blackburn*, 95 So. 2d 260 (1957).

[6] Florida 1959 Laws, chapter 59-295, Regular Session, 37th Legislature.

and Arizona decisions upholding Sunday closing laws exist in full force side by side with the invalidating decisions which have special local grounds. Arizona's decision implicitly upholds its general State Sunday closing law. And the Florida Legislature in 1959 hopefully tried again.

One of the points most stressed by the plaintiffs herein before the three-judge court was the hardship caused to them by their religious restrictions on Saturday when combined with their statutory restrictions on Sunday. Similar contentions have been unsuccessfully raised in six State Supreme Courts, and *semble* in two others. In one such case, *Friedman* v. *New York*, 341 U.S. 907 (1951), the Supreme Court of the United States dismissed an appeal as presenting no substantial Federal question. In no such case until *Crown Kosher* below has this point been successfully contended for by a Saturday sabbatarian. See Appendix B, Alabama, Arkansas, Michigan, Missouri, New York, Pennsylvania and *semble* Maryland and South Carolina.

The adjudicatory tableau, then, can be generally described thus: The Supreme Court of the United States has never held invalid any Sunday closing law. In the minority of States in which there are adjudications of invalidity of specific local ordinances or statutes there are reasons of restricted application given for the invalidation, not suggesting that the State reject Sunday closing legislation on any ground like that in *Crown Kosher Super Market* v. *Gallagher*, 176 F. Supp. 466 (D.C. D. Mass. 1959). *Crown Kosher* is unique.

The majority opinion of the three-judge court in the case at bar cites six Sunday closing State decisions to justify its conclusion—State cases from Illinois, Florida, Ne-

braska, Missouri, Colorado and Oklahoma. See 176 F. Supp. 475, 476, Record, page 146.

In addition, the majority below at that point cites one opinion of the Supreme Court of the United States, *Smith* v. *Cahoon*, 283 U.S. 553 (1931). The *Cahoon* case finds that classification in a Florida statute is "entirely arbitrary" and therefore that the equal protection clause is violated. A Florida statute required private carriers for hire to procure a certificate of public convenience and necessity and to make certain payments to the State, but excluded persons operating school buses and persons transporting certain agricultural, dairy and fish products to primary markets. The Supreme Court, with an opinion by Mr. Chief Justice Hughes, found that there was no justification for making a distinction between those who carried for hire the excepted items and those who carried for hire bread or sugar or tea or coffee or groceries in general or other useful commodities. No question of any Sunday law was involved. Furthermore, the attitude of the Supreme Court of the United States toward economic regulation was quite different in 1931 from its attitude twenty-nine years later, as evidenced by the series of Supreme Court dismissals of appeals in Sunday closing cases, set forth in this brief, pages 56 to 64.

Of the other six cases, all except that arising in Florida involve local ordinances, and in each there is a finding that the ordinance is in conflict with some provision of the State Constitution or with a State statute. The Missouri, Colorado, Oklahoma, Nebraska and Illinois cases all turn on classifications. The ordinances are found to be invalid

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[8] *City of Springfield* v. *Smith*, 322 Mo. 1129, 19 S.W. 2d 1 (1929); *Allen* v. *City of Colorado Springs*, 101 Colo. 498, 75 P. 2d 141 (1938); *City of Mt. Vernon* v. *Julian*, 369 Ill. 447, 17 N.E. 2d 52 (1938); *Ex parte Hodges*, 83 P. 2d 201 (Okla. Cr. 1938); *Arrigo* v. *City of Lincoln*, 154 Neb. 537, 48 N.W. 2d 643 (1951); *Henderson* v. *Antonacci*, 62 So. 2d 5 (Fla. 1952).

as "special legislation." The Illinois case goes off under the State Due Process Clause on the ground that the classifications are unjustified; such provisions, the Court finds, as that closing establishments of dressmakers or milliners while cigar stores are permitted to be open invalidate the legislation. It is notable that in each of these five States, Missouri, Colorado, Oklahoma, Nebraska and Illinois, there are other adjudications upholding Sunday closing laws. See the tabulation in Appendix B of this brief. The ordinances struck down were so ruled on because of their specific provisions; and such decisions of invalidity, turning on State grounds, cannot be reviewed by the Supreme Court of the United States. *New York City* v. *Central Savings Bank*, 306 U.S. 661 (1939). The Florida case invalidates a Florida Sunday closing statute as applied to the operator of a used-car lot. The law is found unconstitutional, whether under a clause of the State Constitution or under some clause of the Federal Constitution is not clear. The ground appears to be the unjustified character of the classification involved. The Florida Legislature, undisturbed by findings of unconstitutionality, has since attempted in its 1959 session to draft a new statute setting forth adequately the reasons for imposing Sunday closing on car lots. See Florida Laws, 1959, chapter 59-295.

The overwhelming weight of State authority is thus in favor of the validity of statutes such as that in Massachusetts. The cases relied on by the three-judge court below are in conflict with this mass of authority and can perhaps be explained by the willingness of a few State Supreme Courts to find unconstitutionality on economic grounds under State Constitutions. See Carpenter, "Economic Due Process and the State Courts," 45 Amer. Bar Ass'n Journal 1027 (October, 1959).

The great predominance of adjudications in State Supreme Courts finding Sunday closing statutes constitutional, set forth in the tabulation, Appendix B of this brief, becomes more impressive when it is recalled that in every State Constitution there is in some form a guaranty of freedom of religion. These provisions concerning religious liberties are noted in Appendix B in a separate column for each State. The State Supreme Courts have found that Sunday closing statutes constitute no violation of the clauses of the respective State Constitutions guaranteeing a separated Church and State, and assuring freedom of religion. See the discussion at pages 70-71 of this brief. This strong consensus should be persuasive on the Supreme Court of the United States when it considers the same subject. The judgment below should be reversed and the Massachusetts legislation should be declared constitutional.

VI-E.

The Facts, as Established by Testimony or Stipulation, do Not Show Unconstitutionality of Massachusetts Sunday Closing Laws as Applied to Any Plaintiff.

The inferences most favorable to the several plaintiffs herein which could be drawn from the testimony and stipulation of facts herein still do not demonstrate any unconstitutionality of the Massachusetts Sunday closing legislation, either on its face or as applied to any plaintiff. No good purpose would here be served by repeating at length the convincing demonstration in the opinion of the three-judge Federal District Court in *Two Guys from Harrison-Allentown, Inc.*, v. *McGinley*, 179 F. Supp. 944 (D.C. E.D. Pa. 1959), at page 948, that the *Friedman* case arising in New York, 341 U.S. 907 (1951), is on its facts a complete

paralled for the Massachusetts case now at bar. No evidence has been adduced to take the Crown Kosher Super Market, or any other plaintiff herein, out of the rule established in *Friedman*. *Friedman*, and the other mass of United States Supreme Court adjudications arising in eight States, set forth at pages 56 to 64 of this brief, should govern the disposition of the case at bar, and call for a reversal.

VI-F.

The Decree Herein is Not Justified by the Opinion of the Three-Judge District Court.

The decree herein, Record, page 176, contains two numbered subparagraphs, the first of which declares section 5 of chapter 136 of the Massachusetts General Laws "unconstitutional, void and unenforceable as applied to" the plaintiff "insofar as it requires the Crown Kosher Super Market of Mass., Inc., to remain closed on Sunday after it has remained closed on the preceding Friday night and Saturday; . . ."

The second numbered subparagraph of the decree provides—

> "(2) that the defendant, his agents, servants, and employees, and all others acting in his behalf, be, and they hereby are, enjoined and restrained from taking any action whatsoever, by instituting prosecutions or otherwise, to enforce section 5 of said Chapter 136 of the Massachusetts General Laws (Ter. Ed.) as amended, against the plaintiffs in this action; . . ."

For the reasons set forth above under heading VI-E of this argument, pages 76 and 77 of this brief, the opinion of the three-judge court below, which constitutes its find-

ings of fact and conclusions of law, does not justify any decree of unconstitutionality herein, either on the face of the statute or affecting the statute as applied.

In addition to this, however, the decree is confusing and, if the judgment herein were to be affirmed by the Supreme Court of the United States, enforcement of the law by public officers in Massachusetts would be puzzling and difficult. The plaintiffs do not dispute that the religious scruples of those active in the Crown Kosher Super Market would still permit it to be opened on Saturday evening. See the stipulation of fact, paragraph 1. If the Crown Kosher Super Market should decide to stay open on Saturday evenings, would the decree herein cease to have any effect?

Furthermore, the opinion of the Court details with some particularity the distant residences of the plaintiff customers. Should the public authorities of Massachusetts gather that the statute is unconstitutional only as applied to a super market having customers dwelling at a substantial distance, as in the present case? Or should the public authorities take it that the decree, while in terms limited, is in effect a striking out of the statute from the books?

The appellants feel that the decree is unjustified by the opinion and by the evidence. They submit that the shortcomings pointed out concerning the decree furnish an additional reason why the judgment below should be reversed.

Conclusion.

The appellants contend that the proper disposition of this case in the Supreme Court is reversal of the judgment of the Federal three-judge court below, and dismissal of the plaintiff's complaint, on the authority of *Friedman* v. *People of New York*, 341 U.S. 907 (1951), and of the other

adjudications of the Supreme Court of the United States set forth in this brief, pages 56 to 64, inclusive.

If, for some reason not apparent to the appellants, the Supreme Court should decide not to dismiss, the appellants suggest that at least the Supreme Court should find that the three-judge District Court was in error in denying the motion made by the defendants for a new trial. The Supreme Court should remand the case for further hearings, to the end that a full record may be made; that the business situation of the corporate plaintiff's super market may be more fully developed by evidence; that remaining uncertainties in the application of the Sunday closing laws may be clarified by appropriate State court adjudication; and in short that the actual situation, on the basis of which a judgment is asked which will uproot Sunday legislation throughout the United States, may be adequately brought before the Supreme Court.

Respectfully submitted,

EDWARD J. McCORMACK, JR.,
Attorney General of Massachusetts,

JOSEPH H. ELCOCK, JR.,
Assistant Attorney General,

ARTHUR E. SUTHERLAND,

S. THOMAS MARTINELLI,
City Solicitor, Springfield, Massachusetts,

JOHN WARREN McGARRY,
Assistant Attorney General,

Attorneys for Appellants.

Appendix A.

Massachusetts General Laws.

Chapter 136.

Observance of the Lord's Day.

Section 1. [Lord's day, definition.] The Lord's day shall include the time from midnight to midnight.

Section 2. [Presence at games, sports, plays or public diversions on the Lord's day; exceptions.] Whoever on the Lord's day is present at a game, sport, play or public diversion, except a concert of sacred music, a public entertainment duly licensed as provided in section four or a free open air concert given by a town, or by license of the mayor or the selectmen, upon a common or public park, street or square, or except a game of golf conducted on an open air golf course, or except a game of tennis or dancing at a wedding or celebration of a religious custom or ritual if no charge is made for being present or for dancing, or except after one o'clock post-meridian a game of outdoor lawn bowling or the playing of golf or driving on an outdoor golf driving range or playing on a miniature golf course, so called, shall be punished by a fine of not more than five dollars. Whoever on the Lord's day takes part in any game, sport, play or public diversion, except as aforesaid, shall be punished by a fine of not more than fifty dollars. This and the following section shall not apply to amusement enterprises lawfully conducted under section four A or four B or to sports or games conducted in accordance with sections twenty-one to twenty-five, inclusive, in any city or town which accepts said sections or in accordance with sections twenty-six to thirty-two, inclusive, in any city or town in which said sections twenty-six

to thirty-two are then in force. [As revised by St. 1956, c. 212, sec. 256.]

SECTION 3. [Establishing and maintaining public entertainment on the Lord's day.] Whoever offers to view, sets up, establishes, maintains, or attempts to set up, establish or maintain, or promotes or assists in such attempt, or promotes, or aids, abets or participates in offering to view, setting up, establishing or maintaining any public entertainment on the Lord's day, except as provided in section two, unless such public entertainment shall be in keeping with the character of the day and not inconsistent with its due observance and duly licensed as provided in section four, or whoever on the Lord's day acts as proprietor, manager or person in charge of a game, sport, play or public diversion, except a public entertainment licensed under section four and except as provided in section two, shall be punished by a fine of not more than five hundred dollars. [As revised by St. 1955, c. 255, sec. 2.]

SECTION 4. [License to hold public entertainment on the Lord's day; application; fee; suspension; revocation; hearing.] Except as provided in section one hundred and five of chapter one hundred and forty-nine, the mayor of a city or the selectmen of a town may, upon written application describing the proposed entertainment, grant, upon such terms or conditions as they may prescribe, a license to hold on the Lord's day a public entertainment, including musical entertainment provided by mechanical or electrical means, in keeping with the character of the day and not inconsistent with its due observance, whether or not admission is to be obtained upon payment of money or other valuable consideration, and, if the proposed entertainment described in the application is solely for the exhibition of motion pictures, for the benefit of patrons in a public dining room or for the use of television, the use of

radio, or musical entertainment provided by mechanical or electrical means, the mayor or selectmen may grant an annual license therefor; provided, that no such license shall be granted to have effect before one o'clock in the afternoon, nor shall it have effect unless the proposed entertainment shall have been approved in writing by the commissioner of public safety as being in keeping with the character of the day and not inconsistent with its due observance. The application for the approval of the proposed entertainment by the commissioner shall be accompanied by a fee of two dollars, or, in the case of an application for the approval of an annual license, as herein provided, by a fee of fifty dollars. Any such license may, after notice and a hearing given by the mayor or selectmen issuing the same, or by said commissioner, be suspended, revoked or annulled by the officer or board giving the hearing. The foregoing provisions, insofar as they authorize any person to refuse to grant, or to suspend, revoke or annul a license upon the ground that the proposed entertainment is not in keeping with the character of the Lord's day or not consistent with its due observance, and insofar as they require written approval of the proposed entertainment by said commissioner, shall not apply to any person making an application for a license to exhibit motion pictures or for the use of radio or television on said day, nor to any license issued upon such application. [As revised by St. 1954, c. 303 and St. 1957, c. 300; and as added by St. 1955, c. 742 and as ameended by St. 1956, c. 157.]

SECTION 4A. [Maintenance and operation of enterprises at amusement parks, beaches or resorts on the Lord's day; licenses; suspension; revocation.] The mayor of a city or the selectmen of a town, upon written application therefor, and upon such terms and conditions as they may prescribe,

may grant licenses for the maintenance and operation upon the Lord's day at amusement parks or beach resorts, so called, in such city or town, of any enterprise hereinafter described, for admission to which or for the use of which a payment of money or other valuable consideration may or may not be charged, namely:—Bowling alleys, shooting galleries restricted to the firing therein of rifles, revolvers or pistols using cartridges not larger than twenty-two calibre, photographic galleries or studios in which pictures are made and sold, games, and such amusement devices as may lawfully be operated therein on secular days; provided, that no such license shall be granted to have effect before one o'clock in the afternoon, nor shall it have effect unless the proposed enterprise shall, upon application accompanied by a fee of two dollars, have been approved in writing by the commissioner of public safety as provided in the case of public entertainments under section four. Any licensee hereunder may distribute premiums or prizes in connection with any game or device lawfully maintained and operated by him under authority hereof. Any such license may, after notice and a hearing given by the mayor or selectmen issuing the same, or by said commissioner, be suspended, revoked or annulled by the officer or board giving the hearing. So much of this section as relates to the maintenance and operation of bowling alleys shall not apply in any city or town which shall have accepted the provisions of section four B. [As revised by St. 1933, c. 309, sec. 1 and as amended by St. 1946, c. 207, sec. 2.]

SECTION 4B. [Licenses for operation of bowling alleys on the Lord's day.] In any city which accepts this section by vote of its city council and in any town which accepts this section by vote of its inhabitants, the city council, with the approval of the mayor, or the selectmen, as the case may be, may grant licenses for the operation of bowling

alleys on the Lord's day between the hours of one and eleven post meridian; provided, that no such license may authorize the operation of bowling alleys on Easter, or on Christmas day if such day falls on the Lord's day. Every license granted hereunder shall specify the location of the place of business in which the license is to be exercised, and the license shall not be valid in any other place. Bowling alleys operated under such licenses shall be operated subject to such regulations and restrictions as shall be prescribed from time to time by the city council, with the approval of the mayor, or by the selectmen. Said regulations and restrictions shall be stated in the license. Said licensing authorities may at any time and without previous notice revoke licenses issued under this section if they have reason to believe that any provision of this section, or of any regulation or restriction prescribed thereunder, is being or will be violated. [As added by St. 1946, c. 207, sec. 3.]

SECTION 5. [Keeping open shops or warehouses and conducting business or doing work on the Lord's day.] Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars.

SECTION 6. [Limit of operation of section 5.] The preceding section shall not prohibit the manufacture and distribution of steam, gas or electricity for illuminating purposes, heat or motive power; the distribution of water for fire or domestic purposes; the use of the telegraph or the telephone; the manufacture and distribution of oxygen, hydrogen, nitrogen, acetylene and carbon dioxide; the retail sale of drugs and medicines, or articles ordered by the prescription of a physician, or mechanical appliances used by physicians or surgeons.

Nor shall it prohibit the retail sale of tobacco in any of its forms by licensed innholders, common victuallers, druggists and newsdealers whose stores are open for the sale of newspapers every day in the week; the retail sale of bread, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon by licensed innholders and by licensed common victuallers authorized to keep open their places of business on the Lord's day and by persons licensed under the following section to keep open their places of business as aforesaid; the retail sale of frozen desserts and/or frozen dessert mix, soda water and confectionery by licensed innholders and druggists, and by such licensed common victuallers as are not also licensed to sell alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, and who are authorized to keep open their places of business on the Lord's day; the sale of frozen desserts and/or frozen dessert mix, soda water, confectionery or fruit by persons licensed under the following section or the keeping open of their places of business for the sale thereof; the sale of live bait for use by fishermen for non-commercial purposes.

Nor shall it prohibit work lawfully done by persons working under permits granted under section nine; the sale by licensed innholders and common victuallers of meals such as are usually served by them, consisting in no part of alcoholic beverages, as so defined, which meals are cooked on the premises but are not to be consumed thereon; the operation of motor vehicles; the sale of gasoline and oil for use, and the retail sale of accessories for immediate necessary use, in connection with the operation of motor vehicles, motor boats and aircraft; the making of such emergency repairs on disabled motor vehicles as may be necessary to permit such vehicles to be towed or to pro-

ceed under their own power, and the towing of disabled motor vehicles; the letting of horses and carriages or of boats, motor vehicles or bicycles; the letting on trains of equipment or accessories for personal use in connection with outdoor recreation and sports activities; unpaid work on pleasure boats; the running of steam ferry boats on established routes; the running of street railway cars; the running of steamboat lines and railroad trains or of steamboats.

Nor shall it prohibit the preparation, printing and publication of newspapers, or the sale and delivery thereof; the wholesale or retail sale and delivery of milk, or the transportation thereof, or the delivery of frozen desserts or frozen dessert mix, or both, or the wholesale or retail sale of ice or of fuel; the transportation of general commodities by motor truck or trailers, then engaged in interstate commerce before eight o'clock in the forenoon and after eight o'clock in the evening or in the event of an emergency between the aforesaid hours; the transportation of petroleum products by motor truck or trailers then engaged in intrastate commerce before six o'clock in the forenoon and after ten o'clock in the evening; the transportation of livestock, farm commodities and farm equipment for participation in fairs, exhibitions and sporting events and veterinary purposes; the handling, transportation and delivery of fish and perishable foodstuffs at wholesale; the sale at wholesale of dressed poultry, and the transportation of such poultry so sold, on the Lord's day next preceding Thanksgiving day, and on the Lord's day next preceding Christmas day except when Christmas day occurs on Saturday, the Lord's day or Monday; the making of butter and cheese; the keeping open of public bathhouses; the making or selling by bakers or their employees, before ten o'clock in the forenoon and between the hours of four

o'clock and half past six o'clock in the afternoon, of bread or other food usually dealt in by them; whenever Rosh Hashonah, or the Day of Atonement, begins on the Lord's day, the retail sale and delivery of fish, fruit and vegetables before twelve o'clock noon of that day; the selling or delivering of kosher meat by any person who, according to his religious belief, observes Saturday as the Lord's day by closing his place of business during the day until six o'clock in the afternoon, or the keeping open of his shop on the Lord's day for the sale of kosher meat between the hours of six o'clock and ten o'clock in the forenoon.

Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby; the carrying on of the business of bootblack before eleven o'clock in the forenoon, unless prohibited in a city or town by ordinance or by-law; the digging of clams; the icing and dressing of fish; the cultivation of land, and the raising, harvesting, conserving and transporting of agricultural products during the existence of war between the United States and any other nation and until the first day of January following the termination thereof; such unpaid work in or about private gardens or private grounds, adjacent to a dwelling house, as shall not cause unreasonable noise, having regard to the locality where such work is performed.

Nor shall it prohibit the sale of catalogues of pictures and other works of art in exhibitions held by societies organized for the purpose of promoting education in the fine arts or the exposure of photographic plates and films for pleasure, if the pictures to be made therefrom are not intended to be sold and are not sold.

Nor shall it prohibit the conduct of any enterprise lawfully conducted under section four A or section four B.

Nor shall it prohibit the necessary preparation for and the conducting of private industrial trade expositions which are not open to the general public; provided, that said expositions shall be kept open only between the hours of one and ten o'clock post meridian.

Nor shall it prohibit the sale of fruit and vegetables by the person who raised the same, or by his agent thereunto duly authorized, on premises owned or leased by him. [As revised by St. 1934, c. 373, sec. 6; St. 1946, c. 207, sec. 4; and St. 1957, c. 356, secs. 16 and 17; as added by St. 1949, c. 190 and St. 1950, c. 322; and as amended by St. 1959, c. 256, sec. 1.]

SECTION 7. [Sale of frozen desserts, frozen dessert mix or confectionery on the Lord's day.] In Boston, and in any other city or town which accepts this section and section eight or has accepted corresponding provisions of earlier laws, in a city by its city council or in a town by the voters of the town at an annual town meeting, the licensing board or officer in such city or town, or if there is no such board or officer the aldermen of a city, or if there are no aldermen the city council, with the approval of the mayor, or the selectmen of a town, may grant, to any reputable person who on secular days is a retail dealer in frozen desserts and/or frozen dessert mix, confectionery, soda water or fruit and who does not hold a license for the sale of alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, a license to keep open his place of business on the Lord's day for the sale of frozen desserts and/or frozen dessert mix, confectionery, soda water or fruit. [As revised by St. 1957, c. 356, sec. 18.]

SECTION 8. [Provisions of licenses to sell frozen desserts, ice cream mix or confectionery on the Lord's day;

fee; revocation.] Every license granted under the preceding section shall specify the street or place and the number, if any, or if there is no number, the location of the place of business in which the license is to be exercised, and the license shall not be valid in any other place. Such licenses shall expire on April thirtieth of each year; but they may be granted during April, to take effect on May first following. The fee for such license shall not be more than five dollars a year, and it may be suspended or revoked by the officer or board granting the same. [As amended by St. 1937, c. 124.]

SECTION 9. [Permit for performance of necessary work or labor on the Lord's day.] The police commissioner of Boston, or any member of the police department having a rank not lower than that of captain and designated by said commissioner, or the chief of police or other officer in charge of the police department of any other city or of any town, or the chairman of the board of selectmen of any town, upon such terms and conditions as he deems reasonable, may issue a permit for the performance on the Lord's day of necessary work or labor which in his judgment could not be performed on any other day without serious suffering, loss, damage or public inconvenience. Such permit shall cover not more than one day and shall not be issued more than six days prior to the day for which it is issued. [As amended by St. 1953, c. 108.]

SECTION 10. [Parades with music on the Lord's day.] Any post or camp of an incorporated organization of veterans of any war in which the United States has engaged, or any incorporated civic or fraternal organization, may parade with music on the Lord's day for the purpose of attending divine service, holding commemorative exercises or dedicating memorials; provided, that the music shall be suspended while passing within two hundred feet

of any place of public worship where services are being held.

SECTION 11. [Parades of policemen or firemen with music on certain Sundays.] Any company or association of policemen or firemen, whether in active service or former members of a police or fire department, may parade with music, in the case of policemen, on policemen's memorial day, the first Sunday of June in each year, and, in the case of firemen, on firemen's memorial day, the second Sunday of June in each year, for the special purpose of decorating the graves of deceased policemen or firemen, as the case may be; provided, that the music shall be suspended while passing within two hundred feet of any place of public worship where services are being held.

SECTION 12. [Entertainment of travelers or strangers in places of public entertainment.] Whoever, keeping a house, shop, cellar or place of public entertainment or refreshment, entertains therein on the Lord's day any persons other than travelers, strangers or lodgers, or suffers such persons on said day to remain therein or in the yards, orchards or fields appertaining thereto, drinking or spending their time idly or at play, or in doing any secular business, shall for a first offence be punished by a fine of not more than fifty dollars for each person so entertained or suffered so to remain; and for a subsequent offence by a fine of not more than one hundred dollars; and if convicted three times, he shall thereafter be disqualified to hold a license.

SECTION 13. [Service or execution of civil process on the Lord's day; service by publication.] A civil process shall not be served or executed on the Lord's day, and such service if made shall be void, and the person who serves or executes it shall be liable in damages to the person aggrieved in like manner as if he had no such process; pro-

vided, that this section shall not apply to service of such process by publication in a newspaper published on the Lord's day. [As amended by St. 1932, c. 105.]

SECTION 14. [Rude or indecent behavior in houses of public worship.] Whoever on the Lord's day behaves rudely or indecently in any house of public worship shall be punished by a fine of not more than ten dollars.

SECTION 15. [Limitation of the commencement of prosecutions.] Prosecutions for penalties incurred under the preceding provisions of this chapter shall be commenced within six months after the offence was committed.

SECTION 16. [Inquiry into violations; enforcement.] Sheriffs, constables and grand jurors shall inquire into and inform of all violations of this chapter, and cause it to be enforced.

SECTION 17. [Discharging firearms and fishing on the Lord's day; discharge of firearms in shooting galleries or at field trials.] Whoever on the Lord's day discharges any firearm for sport or in the pursuit of game, or attempts to take or catch any fish by using any net or spear, or attempts to take or catch any fish for commercial purposes by using a hook and line, shall be punished by a fine of not more than ten dollars; provided, that, on said day, shiners may be taken for bait by licensed fishermen, and eels and suckers may be taken with a spear. Prosecutions hereunder shall be commenced within thirty days after the offence was committed. This section shall not apply to the discharge of firearms in any shooting gallery licensed under section four A, or at any field trial licensed under section one hundred and twelve A of chapter one hundred and thirty-one, and subject to the restrictions therein imposed, nor shall it apply to the discharge of firearms, in trap, skeet or target shooting if carried on at such places within the limits of any city or town and dur-

ing such hours as the city council or selectmen approve and in accordance with regulations which they are hereby authorized to establish. [As revised by St. 1938, c. 60 and St. 1955, c. 524, sec. 3.]

SECTION 18. [Punishment of innholders permitting use of implements for gaming on the Lord's day.] Any innholder, common victualler or person keeping or suffering to be kept in any place occupied by him implements such as are used in gaming, in order that the same may for hire, gain or reward be used for purposes of amusement, who, on the Lord's day, uses or suffers to be used any such implements upon any part of his premises, shall for a first offence be punished by a fine of not more than one hundred dollars or by imprisonment for not more than three months; and for a subsequent offence by imprisonment for not more than one year; and in either case shall further recognize, with sufficient sureties, in a reasonable sum for his good behavior, and especially that he will not be guilty of any violation of this section for three months after the date of his recognizance.

SECTION 19. [Repealed. St. 1950, c. 256, sec. 2.]

SECTION 20. [Chapter as defense to action for tort or injury.] The provisions of this chapter shall not constitute a defence to an action for a tort or injury suffered by a person on the Lord's day.

CERTAIN SPORTS AND GAMES PERMITTED ON THE LORD'S DAY.

SECTION 21. [Athletic outdoor sports or games.] In any city which accepts sections twenty-one to twenty-five, inclusive, by vote of its city council, or in any town which accepts said sections by vote of its inhabitants, it shall be lawful on the Lord's day to take part in or witness any athletic outdoor sport or game, as hereinafter provided,

between the hours of one thirty and six thirty post meridian and, in the case of a baseball game commenced before the hour of six thirty post meridian, for such further time beyond said hour as may be necessary to complete said game; provided, that said game had been scheduled to commence at or before the hour of three post meridian, or is the second of two successive games to be played on the same day, the first of which had been scheduled to commence at or before the hour of two post meridian. In any such city or town it shall be lawful on the Lord's day to take part in or witness, as hereinafter provided, any indoor hockey or basketball game between the hours of one thirty post meridian and twelve midnight. [As revised by St. 1954, c. 132.]

SECTION 22. [Licensed playgrounds or parks for athletic outdoor sports or games.] Such sports or games shall take place on such playgrounds, parks or other places as may be designated for that purpose in a license or permit issued by the city council, with the approval of the mayor, or by the selectmen; provided, that if, under any statute or ordinance, a public playground or park is placed under the exclusive charge and authority of any other officials, such officials shall, for that playground or park, be the licensing authority; and provided, that no sport or game shall be permitted in a place, other than a public playground or park, within one thousand feet of any regular place of worship.

SECTION 23. [Regulations and restrictions governing athletic outdoor sports or games; admission fees.] Such sports or games shall be conducted subject to such regulations and restrictions as shall be prescribed from time to time by the city council or the selectmen; provided, that they shall not prohibit the charging of admission fees or the taking of collections at any such sport or game, nor

shall they prohibit the receiving of remuneration by any proprietor, manager or person in charge of any such sport or game or by any participant therein. Said regulations and restrictions shall be stated in the license or permit.

SECTION 24. [Revocation of permits.] The licensing authorities described in section twenty-two may at any time and without previous notice revoke permits to conduct the said sports or games if they have reason to believe that any provision of sections twenty-one to twenty-five, inclusive, or of any regulation or restriction prescribed under section twenty-three, is being or will be violated.

SECTION 25. [Outdoor exercises not involving element of contest.] Sections twenty-one to twenty-five, inclusive, shall not prohibit participation at other hours on the Lord's day in other outdoor exercise not involving the element of contest, nor shall they permit horse racing, automobile racing, boxing, or hunting with firearms.

SECTION 26. [Athletic outdoor sports or games not involving pecuniary reward, remuneration or consideration.] In any city or town wherein the corresponding provisions of this and the six following sections were in effect on the sixth day of December, nineteen hundred and twenty-eight, and which has not voted against said sections on resubmission as provided in section thirty-one, and has not accepted the provisions of sections twenty-one to twenty-five, inclusive, as provided in section twenty-one, it shall be lawful to take part in or witness any athletic outdoor sport or game, in which the contestants do not receive and have not been promised any pecuniary reward, remuneration or consideration whatsoever directly or indirectly in connection therewith, on the Lord's day between the hours of two and six in the afternoon as hereinafter provided.

SECTION 27. [Licensed playgrounds or parks for athletic outdoor sports or games not involving pecuniary award, remuneration or consideration.] Such sports or games shall take place on such playgrounds, parks or other places as may be designated for that purpose in a license or permit issued by the city council, with the approval of the mayor, or by the selectmen; provided, that if, under any statute or ordinance, a public playground or park is placed under the exclusive charge and authority of any other officials, such officials shall, for that playground or park, be the licensing authority; and provided, that no sport or game shall be permitted in a place, other than a public playground or park, within one thousand feet of any regular place of worship.

SECTION 28. [Regulations and restrictions governing athletic outdoor sports or games not involving pecuniary reward, remuneration or consideration.] Such sports or games shall be conducted subject to such regulations and restrictions as shall be prescribed by the city council or selectmen, and the same shall be stated in the license or permit.

SECTION 29. [Admission fees.] No admission fee shall be charged directly or indirectly, and no business or other enterprise shall be conducted, and no collection shall be made at any such sport or game.

SECTION 30. [Revocation of permits.] The licensing authorities described in section twenty-seven may at any time and without previous notice revoke permits to conduct the said sports or games if they have reason to believe that any provision of sections twenty-six to twenty-nine, inclusive, or of any regulation or restriction prescribed under section twenty-eight, is being or will be violated.

SECTION 31. [Resubmission of sections 26 to 32 in cities or towns; petition.] In any city or town in which the provisions of sections twenty-six to thirty-two, inclusive, are in force, said sections shall be resubmitted to the voters at a municipal election, if a petition to that effect, signed by not less than ten per cent of the voters, is filed with the city or town clerk not less than thirty days before the election. If, upon such resubmission, a majority of the voters voting thereon vote against said sections, they shall cease to have effect in that city or town.

SECTION 32. [Outdoor exercises not involving element of contest.] Sections twenty-six to thirty-one, inclusive, shall not prohibit participation at other hours on the Lord's day in other outdoor exercises not involving the element of contest, nor shall they permit horse racing, automobile racing, boxing, or hunting with firearms.

Appendix B.

Introduction.

Explanation of Table of State Sunday Closing Legislation and Adjudication.

The occurrence of Sunday legislation in some form in each of the fifty states of the Union, and as well as in certain other jurisdictions in the United States, the District of Columbia and Puerto Rico, and the occurrence of adjudications in most of these jurisdictions, a great preponderance of which declares the constitutionality of Sunday closing statutes, makes it desirable to have a tabulation of this material readily available for reference purposes in this brief.

In many instances the adjudications upholding the validity of Sunday closing statutes do not specify clearly the nature of the attempted objection to the legislation—specifically whether the asserted objection arises under the State or Federal constitutions or both. Because all State Constitutions contain provisions guaranteeing religious freedom in one form or another, it is desirable to have readily available a reference to such provisions; whenever a State statute is upheld by a State court there is either necessarily an express finding of compliance with the State constitutional provision for freedom of religion, or at the very least there was an opportunity in this litigation for the person attacking the legislation to assert a conflict with such a State constitutional provision. For this reason the tabulation includes a reference to such State constitutional guaranties. Appendix B contains eight columns. The first column from left to right gives the name of the State or other jurisdiction in question. The second column gives a citation to the most recent Sunday legislation in the State in question. The third column gives a reference to

the State constitutional provision guaranteeing religious freedom. The fourth column indicates the presence or absence of what is described in the table as "comprehensive prohibitions." This phrase describes what is ordinarily a brief statutory clause comprehensively forbidding commercial or industrial work or labor on Sunday, ordinarily excepting "works of necessity and charity." An example is section 5 of Massachusetts General Laws, chapter 136, set forth in Appendix A to this brief. The fifth column states the presence or absence of "specific prohibitions" in the particular state. Examples are section 13 of Massachusetts General Laws, chapter 136, Appendix A, prohibiting the service of civil process on the "Lord's Day"; section 17 of chapter 136, prohibiting certain hunting and fishing activities on that day; and section 18 of the same statute, prohibiting on that day the keeping by innholders of gaming devices for amusement on that day.

The sixth column shows whether in the State or other jurisdiction there is a "Sabbatarian Exemption." A typical example occurs in the first clause of the 5th paragraph of section 6 of Massachusetts General Laws, chapter 136, set forth in Appendix A, which provides in substance that the comprehensive prohibition of section 5 shall not "prohibit the performing of secular business and labor on the 'Lord's Day' by any person who conscientiously believes that the 7th day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby; . . ." The seventh column states the presence or absence of essential and recreational exceptions. A series of such exceptions is found in section 6 of chapter 136, of Massachusetts General Laws, including the distribution of steam, gas or electricity, the distribution of water, the use of telegraph and telephone, the sale of drugs and medi-

cines and medical equipment. The statutes of many States expressly provide for permission to sell certain essential commodities for household use, characteristically ice, milk and bread. Recreational exceptions to the comprehensive Sunday closing laws include many types of recreational activity which in the judgment of the State Legislature have been thought to add to the opportunity of the people of the State to use Sunday for pleasant outings or for other family diversions. Thus in section 6 of chapter 136 of Massachusetts General Laws live bait may be sold to permit recreational fishing; gasoline and oil and accessories may be sold for the use of motor cars and motor boats on Sunday; clams may be dug; catalogues of pictures and other works of art may be sold to those who visit exhibits. Under section 21 of chapter 136 of Massachusetts General Laws public baseball, hockey and basketball are lawful if permitted by vote of the city or town authorities. So under section 4A of chapter 136 of Massachusetts General Laws local authorities may authorize various amusement at parks, beaches or resorts on "the Lord's Day."

The eighth column undertakes to give the important older, and recent adjudications upholding, or finding invalid, Sunday closing laws or other Sunday legislation; the ground of the objection, particularly whether based on the Federal or the State Constitutions; and, where it is particularly significant, the nature of the procedure. In cases where a person observed Saturday as a Sabbath and claimed exemption from the Sunday laws on that ground, although not so allowed by statute or otherwise, this has been indicated in the column of adjudications.

A summary of the number of States in which adjudications occur upholding Sunday legislation, and a summary of the adjudications, where they occur, finding Sunday leg-

islation invalid, with a classification of the grounds of so holding, occurs in point VI-d of this brief, pages 65 to 76.

For the convenience of the Court, a list of recent Law Review commentaries on Sunday closing legislation and adjudication is here appended.

RECENT LAW REVIEW NOTES ON SUNDAY CLOSING STATUTES.

"Sunday Statutes in a Modern Community," 61 Yale Law Journal, 427 (March, 1952).

"Sunday Closing Laws; Police Power Restrictions on Business," 4 St. Louis University Law Journal, 365 (Fall, 1957).

"Sunday Blue Laws: An Analysis of Their Position in our Society," 12 Rutgers Law Review, 505 (Spring, 1958).

"General Survey of the Sunday and Holidays Laws in New England," 39 Boston University Law Review, 543 (Fall, 1959).

"State Sunday Laws and the Religious Guarantees of the Federal Constitution," 73 Harvard Law Review, 729 (February, 1960).

"New Trend in Civil Rights Litigation? Sunday Laws, Released Time, and Bible Reading in the Public Schools as Affected by the First Amendment," 28 George Washington Law Review, 579 (March, 1960).

"Sunday Blue Laws: A New Battle on an Old Front," 11 Syracuse Law Review, 254 (Spring, 1960).

STATE SUNDAY CLOSING LEGISLATION AND ADJUDICATION TABULATED

APPENDIX B—*Continued.*

STATE SUNDAY CLOSING LEGISLATION AND ADJUDICATION TABULATED.

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute		Exemptions and exceptions		Adjudications
			Comprehensive prohibitions	Specific prohibitions	Sabbatarian exemptions	Essential and recreational exceptions	
Alabama	Ala. Code, Title 14, §§ 420 to 422 (1955 Supp.)	Const. of 1901, Art. I, § 3	yes	yes	no	yes	*Lane* v. *McFayden*, 259 Ala. 205, 66 So. 2d 83 (1953). *Reynolds* v. *McFayden*, 259 Ala. 235, 66 So. 2d 89 (1953). "Police power" upholds statute. No violation of religious liberty or equal protection, Federal or State. *Frolickstein* v. *Mobile*, 40 Ala. 725 (1867), Sunday closing law applied to sabbatarian Saturday-closing Jewish merchant held not violative of State Constitutional freedom of religion clause.
Alaska	Alaska Comp. Laws, § 1-1-6 (1949).	Const. of 1957, Art. I, § 4	no	no	no	no	*In re Dalton*, 8 Alaska 338 (1937). Fine paid on Sunday not ordered refunded. Validity of Alaska statute closing courts on Sunday not passed on.
Arizona	Ariz. Rev. Stat. Ann. § 32-357 (1956)	Const. of 1912, Art. II, § 12, Art. XX, § 1	no	yes	no	no	*Elliott* v. *State*, 29 Ariz. 389, 242 P. 340 (1926). Town ordinance invalidated under State Constitution as making unjustified classification. General power to enact Sunday closing statutes stated *obiter*.

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute: Comprehensive prohibitions	Type of Sunday Statute: Specific prohibitions	Exemptions and exceptions: Sabbatarian exemptions	Exemptions and exceptions: Essential and recreational exceptions	Adjudications
Arkansas	Ark. Stat. Ann. §§ 84 to 2828 (repld. 1960)	Const. of 1874, Art. II, §§ 24, 25, 26	repealed 1953	yes	yes	yes	*Scoles* v. *State*, 47 Ark. 476, 1 S.W. 769 (1886). Sunday closing statute not unconstitutional (Federal or State Constitution not specified) as applied to Saturday-sabbatarian Seventh Day Adventist. *Taylor* v. *Pine Bluff*, 226 Ark. 309, 289 S.W. 2d 679 (1956); cert. den. 352 U.S. 894 (1956). XIVth Amendment not violated by statute so enforced as to close grocery stores on Sunday but leave other stores open. Followed in *Hickinbotham* v. *Williams*, 227 Ark. 126, 292 S.W. 2d 897 (1956).
California	Cal. Code Ann., Gov. § 6700 (1959)	Const. of 1849, Art. I, § 4	repealed 1925	no	no	no	*Ex parte Newman*, 9 Calif. 502 (1858). Sunday-closing law invalid under religious freedom clause and clause resembling Federal due process clause, both in State Constitution, as applied to a Jewish merchant. *Ex parte Andrews*, 18 Calif. 678 (1861). Sunday Act of 1861 upheld on State Constitution challenge. Dissenting opinion in *Newman* stated as now prevailing law. *Soon Hing* v. *Crowley*, 113 U.S. 703 (1885). Affirms a denial of habeas corpus to one convicted of night work in violation of San Francisco ordinance. Dictum, widely quoted and followed, upholds Sunday closing laws as labor

							Affirms a denial of habeas corpus to one convicted of night work in violation of San Francisco ordinance. Dictum, widely quoted and followed, upholds Sunday closing laws as labor regulation. *Deese* v. *City of Lodi*, 21 Calif. App. 2d 631, 69 P. 2d 1005 (1937). City ordinance closing grocery but allowing cigar, etc., stores open is invalid under equal-privileges clause of State Constitution and *semble* XIVth Amendment due process and equal protection clauses.
Colorado	Colo. Rev. Stat. § 40-8-14; § 27-1-4(5) (1953)	Const. of 1876, Art. II, § 4	yes	yes	no	no	*Mosko* v. *Dunbar*, 135 Colo. 172, 309 P. 2d 581 (1957). Statute forbidding Sunday automobile sales does not offend XIVth Amendment, even though farm tractors, etc. excepted. *City of Denver* v. *Bach*, 26 Colo. 530, 58 P. 1089 (1899). City ordinance closing clothing and other enumerated stores invalid under State Constitution as "class legislation." *McClelland* v. *City of Denver*, 36 Colo. 486, 86 P. 126 (1906). Sunday closing ordinance covering barber shops not invalid on "constitutional" (State or Federal, or both, not clearly stated) grounds, as "class legislation."
Connecticut	Conn. Rev. Stat. §§ 53-301 to -303 (1958). § 53-300 (Supp. 1959)	Const. of 1955, Art. I, §§ 3, 4	yes	yes	yes	yes	*State* v. *Hurliman*, 143 Conn. 502, 123 A. 2d 195 (1956). Conviction of delicatessen proprietor who sold liverwurst in violation of Sunday closing statute not convicted in violation of equal protection clauses in State and Federal Constitutions; defendant's argument was that the statute excepted sales of milk, tobacco, bakery products, etc. *State* v. *Shuster*, 145 Conn. 554, 145 A. 2d 196 (1958). *Hurliman* case followed; furniture dealer unsuccessfully defended Sunday-law

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute: Comprehensive prohibitions	Type of Sunday Statute: Specific prohibitions	Exemptions and exceptions: Sabbatarian exemptions	Exemptions and exceptions: Essential and recreational exceptions	Adjudications
							prosecution by pointing out that the statute excepted antique dealers, and contending that this denied equal protection guaranteed by State and Federal Constitutions.
Delaware	Del. Code Ann., §§ 906 & 152	Const. of 1879, Art. I, § 1 (1953)	no	yes	no	no	None
District of Columbia	Dist. Col. Code, §§. 25 to 107 (1951)	United States Const. of 1787, Amdts. I, XIV	no	yes	no	no	*In District of Columbia* v. *Robinson*, 30 App. D.C. 282 (1908), an information for Sunday work in violation of a Maryland Act of 1723 was held properly dismissed. The Act was obsolete and repealed by implication. *Siddons* v. *Edmondston*, 42 App. D.C. 459 (1914). Police regulations of District of Columbia which forbade public shows, etc., on Sunday upheld as applied to baseball. Not invalidated by any policy analogous to XIVth Amendment.
Florida	Fla. Stat. Ann., §§ 855.01 to .05 (1955), and Fla. Laws of 1959, c. 59-295	Const. of 1885, Declaration of Rights, §§ 5, 6	held unconstitutional	yes	no	yes	*Gilooley* v. *Vaughn*, 92 Fla. 943, 110 So. 653 (1926). Sunday movie-closing city ordinance not invalidated by State Constitution's due process clause. *Kelly* v. *Blackburn*, 95 So. 2d 260 (Fla. Supr. Ct. 1957). General Sunday closing laws applied here to a used-car dealer; held unconstitutional (State or Federal Constitution not clear) on ground of unjustifiable exceptions. Florida Laws, 1959, c. 59-295, is a corrective measure reciting distinctive reasons for Sunday closing of car-sellers.
Georgia	Ga. Code Ann. §§ 26-6901 to -6920 (1953)	Const. of 1945, Art. I, §§ 2-112, 2-113, 2-114	yes	yes	no	yes	*Hennington* v. *Georgia*, 163 U.S. 299 (1896). A Georgia law forbidding Sunday freight-trains held not invalid as in conflict with the Federal commerce clause, though applied to a freight-train on an interstate journey. "It is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty." *ibid.* p. 304.
Hawaii	Hawaii Rev. Laws, §§ 144-33, 155-19 (1955)	Const. of 1950, Art. I, § 3	no	yes	no	yes	None

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute		Exemptions and exceptions		Adjudications
			Comprehensive prohibitions	Specific prohibitions	Sabbatarian exemptions	Essential and recreational exceptions	
Idaho	Idaho Code, §§ 18 to 6203 (1948, Cum. Supp. 1959)	Const. of 1890, Art. I, § 4 Art. IX, §§ 5, 6 Art. XX, § 19	no	yes	no	yes	*State* v. *Dolan*, 13 Idaho 693, 92 P. 995 (1907). Neither State Constitution nor XIVth Amendment contravened by compulsory Sunday closing law, as applied to a grocer, despite specific exemptions for restaurants, livery-stables, for sales of sickroom supplies, candy, cigars, etc. *State* v. *Cranston*, 59 Idaho 561, 85 P. 2d 682 (1938). *Dolan* is followed and approved on similar facts despite an argument that "times and conditions have changed."
Illinois	Ill. Stat. Ann. c. 38, § 549 (1939)	Const. of 1870, Art. II, § 3; Art. VII, § 3; Art. IX, § 3	no	yes	yes	no	*City of Mt. Vernon* v. *Julian*, 369 Ill. 447, 17 N.E. 2d 52 (1938). City ordinance contained comprehensive Sunday closing requirements with specific exemptions for restaurants, drug-stores, tobacco-stores etc. Julian convicted of running a grocery on Sunday. Supreme Court of Illinois reversed conviction. "We do not see where the public welfare is served by closing the grocery store and allowing a confectionery store to remain open, nor in closing a notions store while a drug store next door which sells notions is permitted to operate. . . . Liberty, as that term is used in the constitution . . .
							[State or Federal not specified] unduly re-

as that term is used in the constitution . . .

[State or Federal not specified] unduly restricted."

Humphrey Chevrolet Inc. v. *City of Evanston*, 7 Ill. 2d 402, 131 N.E. 2d 70 (1956). Automobile dealers sought to enjoin, as applicable to them, a comprehensive Sunday closing city ordinance with specific commodities exempted. *Mt. Vernon* distinguished on ground there grocery store required to close while tobacco or confectionery store selling some of same commodities permitted to be open. But no sales of automobiles by any one permitted. Relevanec to State or Federal Constitution not stated. As to violation of religious freedom of State Constitution: "The plaintiffs, most of whom are corpofations, have not alleged that they are members of any religious groups that would be affected by this, and therefore they have no standing to raise the objection." Decree dismissing complaint affirmed.

Pacesetter Homes, Inc., v. *Village of South Holland; Cisek* v. *Same*, 18 Ill. 2d 247, 163 N.E., 2d 464 (1960). Cisek and others who run motel, restaurant and gas-station and two residents who wish to use these accommodations or buy goods obtained declaratory judgment holding a comprehensive Sunday closing ordinance with specific exceptions "unconstitutional" "insofar as it prohibits the business of the plaintiffs." Pacesetter Homes, Inc., sought a declaration of unconstitutionality insofar as ordinance prevented exhibiting houses on Sunday; was

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute: Comprehensive prohibitions	Type of Sunday Statute: Specific prohibitions	Exemptions and exceptions: Sabbatarian exemptions	Exemptions and exceptions: Essential and recreational exceptions	Adjudications
							denied relief sought. On appeals, the Supreme Court of Illinois refused to consider effect of the ordinance on any individual, but held the ordinance "unconstitutional" (State or Federal not specified) on the stated ground that "since harmless as well as harmful businesses are prohibited the ordinance is arbitrary and cannot be sustained."
Indiana	Burn's Ind. Stat. Ann., §§ 10-4301 to -4305 (1956)	Const. of 1851, Art. I, §§ 2 to 6	yes	yes	yes	yes	*Armstrong* v. *State*, 170 Ind. 188, 84 N.E. 3 (1908). Specific Sunday closing law applicable to barbers violates constitutional clause requiring "a general law" where practicable. *Tinder* v. *Clarke Auto Co.*, 238 Ind. 302, 149 N.E. 2d 808 (1956). Indiana statute fined automobile dealers more than other dealers who violate Sunday closing laws. Dealer obtained injunction below, here vacated. Need for free day for family, severally employed, to enjoy together, stated. Special conditions of automobile business justify special treatment; State Constitution as to "general laws", not validated.
Iowa	Iowa Code	Const. of	yes	yes	no	no	

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute		Exemptions and exceptions		Adjudications
			Comprehensive prohibitions	Specific prohibitions	Sabbatarian exemptions	Essential and recreational exceptions	
							tional. No showing of situation like *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). Theaters should be left to assert any defenses they may have in State courts, subject to review in Superior Court of the United States. Meantime, Federal Courts should not give equitable relief and theater should obey statute.
Kentucky	Ky. Rev. Stat., § 436.160 (1956)	Const. of 1956, Bill of Rights, §§ 1, 5	yes	yes	yes	yes	*Capital Theatre Co.* v. *Commonwealth*, 178 Ky. 780, 199 S.W. 1076 (1918). Conviction for running Sunday movie in violation of comprehensive Sunday closing statute here affirmed. Unsuccessful defense seems based on "necessity" of movie. *Strand Amusement Co.* v. *Commonwealth*, 241 Ky. 48, 43 S.W. 2d 321 (1931). Conviction below for running Sunday movie here reversed because indictment charged several offenses and prosecutor should have elected one. Constitutionality (State or Federal not specified) of statute stated. *City of Harlan* v. *Scott*, 290 Ky. 585, 162 S.W. 2d 8 (1942). City ordinance forbidding Sunday movies here held invalid as conflicting with policy of State statute permitting them. General

Iowa	Iowa Code Ann., § 124.20 (1946)	Const. of 1857, Art. I, §§ 3, 4	repealed 1955	yes	no	no	*State of Iowa* v. *Linsing*, 178 Iowa 484, 159 N.W. 905 (1916). Barber fined below for violation of comprehensive Sunday closing statute. Here affirmed; statute held "constitutional"; whether State or Federal not specified; apparent contention was unjustified classification.
Kansas	Kan. Gen. Stat. Ann., §§ 21-952 to 956 (1949)	Const. of 1859, Bill of Rights, § 7; Art. VI, § 8; Art. XII, § 3	yes	yes	yes	yes	*State of Kansas* v. *Blair*, 130 Kan. 863, 288 P. 729 (1930). Blair convicted below of violating comprehensive Sunday closing statutes by running a movie theater. Here affirmed despite argument based on religious freedom guaranties of State Constitution and of Federal I Amendment. *State* v. *Haining*, 131 Kan. 853, 293 P. 952 (1930). Haining, conceded by State to be a "bona fide Seventh Day Adventist" who observed Saturday as a sabbath, was convicted below of violating a comprehensive Sunday closing statute by running a Sunday movie. Here affirmed despite defendant's contention of unconstitutionality under unspecified provision of Federal Constitution and religious freedom provisions of State Constitution. *Boynton* v. *Fox West Coast Theatres Corp.*, 607 F. 2d 851 (C.C.A. 10, 1932). Theater Corporat. brought suit in United States District Court to enjoin both prosecution and quo warranto, based on Sunday movie operation. Interlocutory injunction granted by District Court on appeal, despite theaters' argument based on Federal commerce clause and on alleged discriminatory enforcement violating XIVth Amendment held reversed and bill dismissed. Statute constitu-

movies here held invalid as conflicting with pol-

							icy of State statute permitting them. General constitutionality of Sunday laws stated.
Louisiana	La. Rev. Stat. Title 57, §§ 191, 193 (1950)	Const. of 1921, Art. I, § 4; Art XIV, § 15 (A) (1)	yes	yes	held unconstitutional	yes	*City of Shreveport* v. *Levy*, 26 La. Ann. 671, 21 Am. Rep. 553 (1874). Defendant convicted below for violating a Sunday closing city ordinance. Here reversed. The ordinance contained an exception in favor of Saturday sabbatarians; ". . . the ordinance of a City Council which gives to one sect a privilege which it denies to another, violates both the constitution and the law, and is therefore null and void." (Federal or State not specified.) *State ex rel. Walker-Merz* v. *Judge*, 39 La. Ann. 132, 1 So. 437 (1886). Held, Walker-Merz not entitled to enjoin judge and District Attorney from prosecuting under Sunday closing statute, on contention that statute conflicts with State Constitution and XIVth Amendment. Statute conflicts with neither: "it . . . is to be judged precisely as if it had selected for the day of rest any day of the week other than Sunday; . . ." *State* v. *Trahan*, 214 La. 100, 36 So. 2d 652 (1948). A Louisiana statute forbade Sunday business, but among exceptions specified hotels, boarding houses and restaurants; the statute allowed hotels and boarding houses to sell wine for table use on Sunday but withheld such permission from restaurants. Trahan was prosecuted and convicted below for serving wine on Sunday in his restaurant. He appealed to the Supreme Court of Louisiana, which, after a rehearing, upheld the statute despite State constitutional and XIVth Amendment challenges

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute: Comprehensive prohibitions	Type of Sunday Statute: Specific prohibitions	Exemptions and exceptions: Sabbatarian exceptions	Exemptions and exceptions: Essential and recreational exemptions	Adjudications
							of the classification. ". . . valid ground for the exemption is always presumed to exist in the absence of a showing that no reasonable state of facts can be conceived to justify it. *Metropolitan Gas Co.* v. *Brownell*, 294 U.S. 580 and cases cited."
Maine	Maine Rev. Stat. Am., c. 134, §§ 38 to 45 (1954) c. 134, § 38A (1959)	Const. of 1834, Art. I, § 3	yes	yes	yes	yes	None
Maryland	Md. Code Ann., Art. 27, §§ 492 to 524 (1957)	Const. of 1867, Arts. XXXVI, XXXVIII	yes	yes	no	yes	*Judefind* v. *State of Maryland*, 78 Md. 510, 28 A. 405 (1894). Judefind, convicted below for husking corn on Sunday in violation of statute, brings error on ground of violation of XIVth Amendment and State Constitution. Held, writ of error quashed for procedural reasons *Obiter*, no violation of State or Federal Constitutions. Failure to provide compulsory rest for non-Sunday sabbatarians on their sabbath not an interference with their religious liberty. *McGowan* v. *State of Maryland*, 220 Md. 117, 151 A. 2d 156 (1959). Conviction for opening store in violation of comprehensive statutory prohibition of Sunday merchandising with specified exceptions, here affirmed. No violation of Ist and XIVth Amendments. Appeal pending in Supreme Court of United States.
Massachusetts	Mass. Gen. Laws c. 136, §§ 5, 6 (1958)	Const. of 1780, Declaration of Rights. Arts. II, III	yes	yes	yes	yes	*Commonwealth* v. *Has*, 122 Mass. 40 (1877). Conviction of Saturday sabbatarian, who observed that day, for keeping his shop open on Sunday, affirmed. State equality of religion constitutional clause no defense. *Commonwealth* v. *Chernock*, 336 Mass. 384, 145 N.E. 2d 920 (1957). Conviction of Saturday sabbatarian who observed that day for keeping supermarket open on Sunday at prohibited hours affirmed. Rights to religious liberty and equality under State Constitution not infringed. *Crown Kosher Super Market of Mass., Inc.*, v. *Gallagher*, 176 F. Supp. 466 (D.C. D. Mass. 1959). General Sunday closing statute with specific exceptions held unconstitutional under XIVth Amendment as applied to plaintiffs insofar as it requires Sunday closing of Market. Appeal pending in Supreme Court of United States. Case discussed in this brief, *passim*.

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute: Comprehensive prohibitions	Type of Sunday Statute: Specific prohibitions	Exemptions and exceptions: Sabbatarian exemptions	Exemptions and exceptions: Essential and recreational exceptions	Adjudications
Michigan	Mich. Stat. Ann. § 18.851 to .852, 18.855 (1957)	Const. of 1908, Art. II, §§ 3, 17, Art. XI, § 1	yes	yes	yes	yes	*Re Berman*, 344 Mich. 598, 75 N.W. 2d 8 (1956). Berman, Saturday sabbath observer as to one of his three stores convicted of keeping his furniture store open on Sunday in violation of Detroit ordinance. He sought state certiorari to review conviction; writ dismissed below; here affirmed. Berman's activities do not fall within sabbatarian exemption of ordinance. Ordinance "a valid exercise of the police power"; no constitutional point specified.
Minnesota	Minn. Stat. Ann., § 614.29 (1945); § 168.275 (1957)	Const. of 1857, Art. I, §§ 16, 17	yes	yes	no	yes	*Petit* v. *Minnesota*, 177 U.S. 164 (1900). Petit, a barber, was convicted under a Minnesota Sunday closing statute which singled out barbering as not work of charity or necessity. Here, on error to Supreme Court of Minnesota, conviction affirmed. The unanimous United States Supreme Court found no Federal constitutional error in the statutory classification. *State ex rel. Hoffman* v. *Justus*, 91 Minn. 447, 98 N.W. 325 (1904). Conviction for selling groceries on Sunday here affirmed. Challenge of classification under State Constitution here rejected in reliance on *Petit*. *State* v. *Dean*, 149 Minn. 419, 184 N.W. 275 (1921). Conviction for [illegible]

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute		Exemptions and exceptions		Adjudications
			Comprehensive prohibitions	Specific prohibitions	Sabbatarian exceptions	Essential and recreational exemptions	
							sales. Injunction denied below. On appeal the judgment was reversed. The ordinance was held in conflict with a State constitutional provision forbidding "a local or special law . . . where a general law can be made applicable . . ." *ABC Liquidators, Inc.*, v. *Kansas City*, 322 S.W. 2d 876 (Supr. Ct. Mo. 1959). Plaintiffs, auctioneers, brought suit to enjoin enforcement of a city ordinance forbidding Sunday auctions. Injunction granted below; City appealed. Here reversed and petition dismissed. The ordinance violates neither State nor Federal equal protection clause.
Montana	Mont. Rev. Code, §§ 94-3511, 94-35 to -216 (1947)	Const. of 1889, Art. III, § 4, Ordinance No. 1	no	yes	no	yes	*State* v. *Loomis*, 75 Mont. 88, 242 P. 344 (1926). A Montana statute forbade Sunday dance-hall operation. Loomis, convicted below of violation, here appeals, contending that the classification is invalid under the XIVth Amendment. Held, judgments affirmed; ". . . " will be presumed that the classification is reasonable and the defendant must assume the burden of showing that there is not any admissible hypothesis upon which it can be justified . . .", 75 Mont. 93.
Nebraska	Neb. Rev.	Const. of	no	yes	yes	yes	*Stewart Motor Co.* v. *City of Omaha*, 190 Neb.

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute: Comprehensive prohibitions	Type of Sunday Statute: Specific prohibitions	Exemptions and exceptions: Sabbatarian exemptions	Exemptions and exceptions: Essential and recreational exceptions	Adjudications
Nevada	Nev. Rev. Stat., § 201.260 (1957)	Const. of 1864, Art. I, § 4	no	yes	no	no	None
New Hampshire	N.H. Rev. Stat. Ann. §§ 578.3 to -.5 (1955)	Const. of 1784, Art. I, § 5	yes	yes	no	yes	None
New Jersey	N.J. Stat. Ann., § 2A; 171-1 (1953) § 2A; 171-1.1 (1955)	Const. of 1947, Art. I, §§ 3, 4, 5; Art. IV, § 792	yes	yes	yes	yes	*Gundaker Central Motors, Inc.*, v. *Gassert; Haber* v. *Gassert*, 23 N.J. 71, 127 A. 2d 56 (1956). Gundaker and Haber were motor dealers. Gundaker did his biggest day's business of the week on Sunday. By suit he attacked the constitutionality of a New Jersey statute forbidding Sunday car dealing. Haber's complaint was substantially similar but also attacked an additional provision for revoking or suspending a dealer's license on conviction. The trial court gave judgments of unconstitutionality in both cases, on the ground of unreasonable classification under "the federal and our State Constitutions." On appeal the Supreme Court of New Jersey found that there was a rational basis for treatment of the automobile business differently from other businesses, unanimously reversed the

							of classification under State Constitution here rejected in reliance on *Petit*. *State* v. *Dean*, 149 Minn. 410, 184 N.W. 27 (1921). Conviction for conducting business of portrait photography here affirmed. Statute held within State's "police power"; nature of constitutional challenge, if any, not specified. *Power* v. *Nordstrom*, 150 Minn. 228, 184 N.W. 967 (1921). Village ordinance forbidding Sunday movies upheld in attempted injunction suit. No constitutional ground specified.
Mississippi	Miss. Code Ann., §§ 2368, 2369 (1956)	Const. of 1890, Art. III, § 18; Art. X, § 25; Art. VIII, § 208	yes	yes	no	yes	*Paramount-Richards Theatres, Inc.*, v. *City of Hattiesburg*, 210 Miss. 271, 49 So. 2d 574 (1950). City obtained an injunction below against theater showing movies after 6 p.m. on Sundays. Here affirmed. No Federal or State constitutional infirmity in statute or in its administration.
Missouri	Mo. Stat. Ann.; § 563.690 to -.700 (1953)	Const. of 1945, Art. I, §§ 5, 6, 7	yes	yes	yes	yes	*Komen* v. *City of St. Louis*, 316 Mo. 9, 289 S.W. 838 (1927). Komen brought suit to enjoin prosecution of a St. Louis, Missouri, city ordinance forbidding sales in bakeshops after 9 a.m. on Sunday. Komen and his customers were Orthodox Jews; his goods were Kosher; he and his customers observed the Saturday sabbath. Komen contended that the ordinance discriminated against them and violated their religious freedom, in conflict with Federal XIVth Amendment and State Constitution. Here denial of permanent injunction in lower court affirmed. *McKaig* v. *Kansas City, Missouri*, 363 Mo. 1033, 256 S.W. 2d 815 (1953). McKaig, a motor-car dealer, brought suit to enjoin enforcement of a city ordinance forbidding Sunday automobile

Nebraska	Neb. Rev. Stat., § 28-938 to -940 (1956)	Const. of 1875, Art. I, § 4	no	yes	yes	yes	*Stewart Motor Co.* v. *City of Omaha*, 120 Neb. 776, 235 N.W. 332 (1931). A city ordinance of Omaha forbade Sunday motor sales. Stewart Company brought suit to enjoin enforcement, contending that it was "class legislation" and discriminatory, violating State Constitution and XIVth Amendment. Below injunction denied. Here affirmed. Ordinance conflicts with neither State nor Federal Constitution. *Arrigo* v. *City of Lincoln, Nebraska*, 154 Neb. 537, 48 N.W. 2d 643 (1951). A Lincoln city ordinance forbade grocery stores and meat markets to open for business on Sunday, but permitted drugstores, ice-cream parlors, fruit stores and certain other vendors who might operate "for necessary purposes" to sell fresh fruits, ice, bread and milk on Sundays. Arrigo and others maintained groceries and markets; they sued to enjoin enforcement, contending classification arbitrary and invalid under State and Federal Constitutions. (Specific constitutional clauses not stated.) The trial court dismissed the petition. On appeal, reversed. "It is not contemplated that there shall be on Sunday business as usual. Places of business activity excepted by the proviso of the ordinance and appellants may have their places of business open on Sunday only 'for necessary purposes' and for the sale of fresh fruits, ice, bread and milk . . ." Whether court relied on State or Federal Constitution is not clear.

State	Citation to Sunday statute	State constitutional provision religious freedom	Type of Sunday Statute: Comprehensive prohibitions	Type of Sunday Statute: Specific prohibitions	Exemptions and exceptions: Sabbatarian exemptions	Exemptions and exceptions: Essential and recreational exceptions	Adjudications
							count department stores for injunction a comprehensive Sunday closing ordinance of Paramus, with specific exceptions, held not unconstitutional (State or Federal not specified), either on ground of unreasonable classification, or of unequal geographical application within State.
New Mexico	N.M. Stat. Ann., §§ 40-44-2, 40-44-3 (1953)	Const. of 1911, Art. II, §§ 11, 5; Art. VII, § 3	yes	yes	no	yes	None
New York	N.Y. Consol. Laws Ann., §§ 2143, 2144 (1944)	Const. of 1938, Art. I, § 3	yes	yes	yes	yes	*People* v. *Havnor*, 149 N.Y. 195, 43 N.E. 541 (1896). A New York statute forbade barbering on Sunday, except that in New York City and in Saratoga Springs it could be carried on until 1 p.m. Havnor was convicted of barbering in New York City after 1 o'clock on Sunday. The Court of Appeals affirmed the conviction despite defendant's arguments under State due process and XIVth Amendment equal protection clause. Writ of error dismissed on procedural grounds. 170 U.S. 408 (1898).

Silverberg Brothers v. *Douglas*, 62 Misc. 340,

State	Citation to Sunday statute	State constitutional provision for religious freedom	Type of Sunday Statute: Comprehensive prohibitions	Type of Sunday Statute: Specific prohibitions	Exemptions and exceptions: Sabbatarian exemptions	Exemptions and exceptions: Essential and recreational exceptions	Adjudications
							mously by the New York Court of Appeals with a *per curiam* opinion. Both defendants then appealed to the United States Supreme Court, which dismissed the appeal on motion for want of a substantial Federal question, 341 U.S. 907 (1951). Both in the New York Court of Appeals and in the United States Supreme Court. Friedman and Praska contended that the statute in question unconstitutionally established a religion contrary to XIVth and Ist Amendments; unconstitutionally denied to Friedman and Praska their Federal Constitutional freedom of religion rights because of their Saturday sabbatarian observance; and denied them due process and equal protection under XIVth Amendment because of the classification in the statute. The defendants also argued discriminatory application of the statute to them. (Statement compiled from New York and United States Supreme Court records and briefs.)
North Carolina	N.C. Gen. Stat., § 103-2 to 103-5 (1958)	Const. of 1876, Art. I, § 26	repealed 1951	yes	no	yes	*State* v. *McGee*, 237 N.C. 633, 75 S.E. 2d 783 (1953). The City Code of Charlotte, North Carolina, forbade public shows on Sunday, permitting movies, however, except 1.30 to 6.30 p.m. and after 9 p.m. McGee, convicted of a violation by running a drive-in movie between 6.30 and 9, appealed to the Supreme Court of North Carolina, arguing unreasonable classification under XIVth Amendment; and religious objections under Federal I Amendment. The North Carolina Supreme Court affirmed the conviction. McGee appealed to the Supreme Court of the United States, which dismissed for want of a substantial Federal question, 346 U.S. 802 (1953). *State* v. *Towery*, 239 N.C. 274, 79 S.E. 2d 513 (1954). Towery was convicted of violating the City Code of High Point, North Carolina, by running a "curb-market" on Sunday. He appealed to the Supreme Court of North Carolina, arguing that specific exceptions in the ordinance made it "unconstitutional" (State or Federal not specified) as to him, because of unreasonable classification. The Supreme Court of North Carolina affirmed. Towery appealed to the United States Supreme Court, which dismissed for want of a substantial Federal question. 347 U.S. 925 (1954).

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			Comprehensive prohibitions	Specific prohibitions	Sabbatarian exemptions	Essential and recreational exceptions	
North Dakota	N.D. Rev. Code, §§ 12-2115 to 12-2122 (1943) (1957 Supp.)	Const. of 1889, Art. I, § 4	yes	yes	yes	yes	*State* v. *Diamond*, 56 N.D. 854, 219 N.W. 831 (1928): Comprehensive Sunday closing statute for stores, with usual specific exceptions for drugs, milk, etc., and permitting fish and meat to be sold before 10 a.m. did not deny to a grocer equal protection as guaranteed by XIVth Amendment.
Ohio	Ohio Rev. Code Ann., §§ 3773.23 to 3773.99; 4709.24; 4301.22 (1953), § 3773.24 (1959 Amdt.)	Const. of 1851, Art. I, § 7	yes	yes	yes	yes	*State* v. *Ullner; State* v. *Kidd*, 167 Ohio St. 521, 150 N.E. 2d 413 (1958). Storekeepers and a clerk were convicted below for violating Ohio Sunday closing law. Convictions here affirmed despite constitutional arguments of religious discrimination and unreasonable classification. (Argued under both State and Federal Constitutions; see reference in *Ullner* below, 105 Ohio App. 546, 3, 143 N.E. 2d 849, 851 (Ohio Ct. App. 1957); to the XIVth Amendment.) Appeals dismissed for want of a substantial Federal question. *Ullner* v. *Ohio*, 358 U.S. 131 (1958), *Kidd* v. *Ohio*, 358 U.S. 132 (1958).
Oklahoma	Okla. Stat. Ann., 21 §§ 907 to 912, 29; § 228 (1951)	Const. of 1907, Art. I, § 2	yes	yes	yes	yes	*Ex parte Hodges*, 65 Okla. Crim. R. 69, 83 P. 2d 201 (1938). The City of Shawnee had an ordinance forbidding places of business to open on Sunday, with the usual exceptions for drugstores, ice-cream parlors, fruit stands, etc. A convicted grocer is here discharged by the Oklahoma Criminal Court of Appeals on habeas corpus because the ordinance conflicted with a clause in the State Constitution "prohibiting special laws where a general law can be made applicable," and is inconsistent with State statutes. *Obiter* statement upholds Sunday laws generally. *Ex parte Johnson*, 77 Okla. Crim. R. 360, 141 P. 2d 599 (1943). Violator of city ordinance prohibiting Sunday barbering denied release on habeas corpus. He contended unsuccessfully, among other arguments, that the ordinance denied him due process and equal protection under the Federal Constitution. *Ex parte Pappe*, 88 Okla. Crim. R. 166, 201 P. 2d 260 (1948). Pappe, convicted of violating a city ordinance forbidding Sunday beer sales, here released on habeas corpus. Ordinance conflicts with a State beer statute. General validity of Sunday laws stated *obiter*.

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Oregon	Ore. Rev. Stat., §§ 690.990, 726.990, 462.120, 463.030 (1953)	Const. of 1859, Art. I, §§ 2-6	no	yes	no	no	*Ex parte Northrup*, 41 Ore. 489, 69 P. 445 (1902). An Oregon statute made Sunday barbering a misdemeanor. Northrup, in custody on charge of violation sought habeas corpus on ground of State unconstitutionality as "special legislation" and Federal unconstitutionality under the XIVth Amendment due process clause. Release denied below; here affirmed. Statute valid under both State and Federal Constitutions. *Chang Sing* v. *Astoria*, 79 Ore. 411, 155 P. 378 (1916). A city ordinance of Astoria forbade stores to stay open after 6 p.m. on week days except Saturdays, when 9 was the closing hour; all were required to close on Sunday. The week preceding Christmas was an exception. Plaintiffs brought suit to enjoin enforcement, pointing out the specific exceptions such as drugstores, cigar stores, fruit and confectionery stores, millinery stores, furniture stores and others. Ordinance held invalid under State constitutional provision requiring that no law grant any citizen privileges or immunities which on the same terms do not belong to all citizens.

tutions." On appeal the Supreme Court of New Jersey found that there was a rational basis for

treatment of the automobile business differently from other businesses, unanimously reversed the judgments below and dismissed the complaints. Gundaker appealed to the Supreme Court of the United States, which "dismissed for want of a substantial federal question." 354 U.S. 933 (1957).

Sarner v. *Union Township*, 55 N.J. Super. 523, 151 A. 2d 208 (1959). Retail merchant plaintiffs obtained a declaratory judgment that a Sunday closing law excepting three counties unreasonably discriminated semble under the XIVth Amendment and the New Jersey Constitution.

Two Guys from Harrison, Inc., v. *Furman*, 160 A. 2d 265 (Sup. Ct. N.J. 1960). After Sarner was decided the New Jersey Legislature adopted a new Sunday closing law to be operative in such of the States' twenty-one counties as might adopt it upon referendum. Twelve counties adopted it. The present plaintiffs brought suit to have the statute declared unconstitutional as a union of State and Church, forbidden by Ist and XIVth Amendments, and by State Constitution and unconstitutional for unreasonable classification under Federal XIVth Amendment and a somewhat comparable State constitutional clause. Trial court dismissed complaint; plaintiffs appealed. Here held proper to deny plaintiffs' motion for summary judgment; but case remanded to trial court to try issue of equal protection.

Masters-Jersey, Inc., v. *Mayor of Poramus*, 160 A. 2d 841 (Sup. Ct. N.J. 1960). In suit by dis-

Silverberg Brothers v. *Douglas*, 62 Misc. 340, 14 N.Y. Supp. 824. (S. Co. Erie Co. 1909). The Silverbergs were Jewish clothiers who refrained from Saturday business. A New York statute comprehensively forbade Sunday selling, with specific exceptions for tobacco, drugs, milk, ice, etc. The Silverbergs sought an injunction here denied by Cuthbert W. Pound, J., who rejected freedom of religion arguments under State Constitution, and rejected classification arguments (Federal or State not specified), citing *Havnor*. *People* v. *Friedman; People* v. *Praska*, 302 N.Y. 75, 96 N.E. 2d 184 (1950). A New York statute, Penal Law § 2147, comprehensively forbade public selling on Sunday, with specific exceptions for tobacco, bread, milk, eggs, ice, drugs, gasoline, fishing tackle and bait, souvenirs. Food sales were permitted before 10 a.m.; bakeries and delicatessens were also permitted to sell cooked and prepared foods between 4 and 7.30 p.m. Except in cities and villages having a population of 40,000 or more, roadside stands could sell vegetables and farm produce; there were exceptions for caterers and meals to be eaten on premises. But no uncooked flesh foods or fresh or salt meats could be sold at any hour on Sunday. Friedman and Praska were Orthodox Jewish butchers; both refrained, for religious reasons, from all Saturday business. Both sold uncooked meat at retail on Sunday. Both were convicted in the New York Court of Special Sessions; their conviction was affirmed without opinion by unanimous Appellate Division, 276 App. Div. 1008, First Department; and was affirmed unani-

						zen privileges or immunities which on the same terms do not belong to all citizens.
						Brunswick-Balke-Collender Co. v. *Evans*, 228 Fed. 991 (D.C. D. Ore. 1916). A comprehensive Sunday closing statute of Oregon excepted drug-stores, barbers, butchers, bakers and others. Brunswick & Co., sellers of billiard and bowling equipment, sued in three-judge Federal District Court to enjoin enforcement. Beside State grounds, plaintiff contended that the statute conflicted with the XIVth Amendment because of the unreasonable classification. The District Court upheld constitutionality, treating freedom of religion as a question purely under the State Constitution. Brunswick appealed to the Supreme Court of the United States, but on motion of the appellees the case was docketed and dismissed with costs, no one opposing, with other cases "disposed of without consideration by the court." 248 U.S. 587 (1918).
Pennsylvania	Pa. Stat. Ann., 18, § 4699.4 (1945), 18, § 4699.9 (Supp. 1958)	Const. of 1874, Art. I, §§ 3, 4	yes	yes	no	yes	*Specht* v. *Commonwealth*, 8 Pa. St. 312 (1948). Specht was a Seventh Day Baptist, keeping Saturday as a sabbath. He was convicted below of violation of a comprehensive statute prohibiting Sunday work. He brought error in the Supreme Court of Pennsylvania, arguing that his religious freedom, guaranteed by the State Constitution, was violated. Judgment affirmed. *Commonwealth ex rel.* v. *Amer. Baseball Club of Phila.*, 290 Pa. St. 136, 138 A. 497 (1927). Ball club, a Pennsylvania corporation, conducted a game for profit, forbidden by a comprehensive Sunday law. The State Attorney General brought quo warranto on the ground that the corporation had no power to play Sun-

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day ball. The court below so held, and enjoined the Club from playing on Sunday. The Club appealed, arguing, beside State grounds, unconstitutional uncertainty under the XIVth Amendment. Affirmed. "We can see no basis whatever for the argument that the act violates the XIV Amdt. to the federal const." 290 Pa. St. 143, 138 A. at 500.

Com. v. *Grochowiak*, 184 Pa. Super. 522, 136 A. 2d 145 (1957). Under a Pennsylvania statute, voters of a township rejected optional Sunday movies. Grochowiak nevertheless showed a film; was convicted under prohibitory terms of statute left in force by rejection of option. He appealed, relying on XIVth Amendment guaranties respecting free expression and discriminatory classification. Conviction affirmed.

Two Guys from Harrison-Allentown, Inc., v. *McGinley*, 179 F. Supp. 944 (D.C. E.D. Pa. 1959). A three-judge District Court refused to enjoin enforcement of the Pennsylvania Sunday closing statutes at the suit of a suburban department store, open every day in the week but doing about a third of its business on Sun-

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Rhode Island	Rhode Island Gen. Laws Ann., § 11-40-1 (1956)	Const. of 1843, Art. I, § 3	yes	yes	yes	yes	None
South Carolina	Code of Laws of S.C., §§ 64-1 to 64-5 (1952) (Supp. 1959)	Const. of 1895, Art. I, § 4	yes	yes	no	yes	*Xepapas* v. *Richardon Chief Constable*, 149 S.C. 52, 146 S.E. 686 (1928). Action to enjoin enforcement of Sunday closing laws applied to "mercantile business." Grounds of complaint, State and Federal unconstitutionality as establishment of religion, prohibition of free exercise, and unreasonaable classification by exempting corporate business. Statute declared unconstitutional on latter ground, citing *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389 (1928). Religious objection, including argument as to constraint of Hebrews and Seventh Day Adventists rejected, citing statement by Cooley, Constitutional Limitations (7 ed.), p. 859, that such laws do not impair religious liberty of those who do not observe Sunday as sacred; laws can be upheld as "regulations of police"

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Mullis v. *Celanese Corp.*, 234 S.C. 380, 108 S.E.

							who do not observe Sunday as sacred, may not be upheld as "regulations of police."
							Mullis v. Celanese Corp., 234 S.C. 380, 108 S.E. 2d 547 (1959). Action by employees to compel Sunday off and time-and-a-half for back Sunday work, under State statute, held untenable as statute construed not to apply to this type of plant. Exemption not unconstitutional under XIVth Amendment and equal protection clause.
South Dakota	S. Dak. Code, § 65.04.04 (Supp. 1951)	Const. of 1889, Art. VI, § 3; Art. XXVI, § 18	yes	yes	no	yes	No Sunday law case. Cf., however, *State* v. *Kramer*, 49 S.D. 56, 206 N.W. 468 (1925), in which the State Supreme Court rejected the defendant's contention that as an Orthodox Jew his need for sacramental wine gave him a constitutional right to possess the wine in question. The Court cited *Reynolds* v. *United States*, 98 U.S. 145 (1878).
Tennessee	Tenn. Code Ann. §§ 39-4001 to -4004 (1956)	Const. of 1870, Art. I, §§ 3, 4; Art. VIII, § 3; Art. IX, §§ 1, 2; Art. XI, § 15	yes	yes	no	yes	*Ragio* v. *State*, 86 Tenn. 271, 6 S.W. 401 (1888). Statute forbidding barbers to shave, cut hair or open their bathrooms on Sunday is invalid under State Constitution, as two subjects are included in one Act, and as it grants to some persons privileges not accorded to others. *Re King*, 46 Fed. 905 (C.C. W.D. Tenn. 1891). Seventh Day Adventist who strictly observed Saturday convicted under Tennessee statute for plowing on Sunday. He sought habeas corpus in the Federal court, urging the XIVth Amendment as invalidating the State proceedings. Prisoner remanded. *Kirk v. Olgiati*, 308 S.W. 2d 471 (Sup. Ct. Tenn. 1957). A Chattanooga Sunday closing ordinance not held invalid at the suit of grocers, who contended that, because drugstores, curb markets,

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							filling stations, etc., were excepted and sold some of the same things groceries sell, the classifications were unconstitutional. Whether State or Federal Constitutions or both not specified.
Texas	Texas Penal Code, Arts. 283 to 287 (1952)	Const. of Art. I, §§ 6, 7	yes	yes	yes	yes	*Searcy* v. *State*, 40 Tex. Crim. R. 460, 51 S.W. 1119 (Ct. Cr. App. 1899). Conviction "for selling liquor, being goods, on Sunday. . . ." here affirmed despite "constitutional" argument (State or Federal unspecified) that exemptions of drugstores, etc., makes statute "class legislation." *Ex parte Kennedy*, 42 Tex. Crim. R. 148, 58 S.W. 129 (Ct. Cr. App. 1900). Habeas corpus to test validity of a conviction of Sunday barbering in violation of a statute. Relator remanded to custody. "Sunday laws are almost within the police power of the State. In the language of Mr. Justice Field in *Soon Hing* v. *Crowley*, 113 U.S. 710, 'Sunday laws are upheld not from any right of the government to legislate for the promotion of religious observance, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor.'" *Clark* v. *Texas*, 319 S.W. 2d 727 (Ct. Cr. Ap. 1959). Conviction for Sunday opening of store

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							464 (1948): Action by proprietor of market to have adjudged invalid a city Sunday closing ordinance. Ordinance closed stores generally, with the usual exceptions. Demurrer sustained below; here on appeal overruled. "The classification being on a commodity basis, it is arbitrary to permit the sale of a can of orange juice or a can of coffee" (State or Federal Constitution not specified).
Vermont	Vt. Stat. Ann., 13, §§ 3301 to 3308 (1958)	Const. of 1793, c. 1, Art. 3	yes	yes	no	yes	*Jacobs* v. *Clark*, 112 Vt. 484, 28 A. 2d 369 (1942). A contract to keep a gasoline station open for business on Sunday, in violation of a general closing statute, is for that reason unenforceable.
Virginia	Va. Code, Ann., § 18-329 to -354 (1950) (Supp. 1958)	Const. of 1889, Art. I, §§ 16, 58	yes	yes	yes	yes	*Broad-Grace Arcade Corp.* v. *Bright, Mayor*, 48 F. 2d 348 (D.C. E.D. Va. 1931). Corporation sought injunction against interference with its conduct of a miniature golf course on Sunday. Plaintiff relied on XIVth Amendment. A three-judge Federal District Court denied an interlocutory injunction; the court's opinion stated that the provisions of the Sunday closing statute could not be enforced as a religious observance but its aim was to prevent the bad effects of

							department store, open every day in the week
							but doing about a third of its business on Sunday. Now No. 36 on the October, 1960, United States Supreme Court Docket, with probable jurisdiction noted. *Braunfeld* v. *Gibbons*, 28 U.S. Law Week 3310, 3346. The United States District Court, E.D. Pa., upheld the Pennsylvania Sunday closing law in litigation raising the questions of the statute's application to orthodox Hebrews. Questions of religious freedom and unreasonable classification under XIVth Amendment. Probable jurisdiction noted. U.S. S.C. May 23, 1960, No. 67, October, 1960, Docket. *Bargaintown, U.S.A., Inc.*, v. *Whitman*, 28 U.S. Law Week 3334. Appeal by Bargaintown from a decree of the United States District Court, M.D. Pa., upholding Pennsylvania Sunday closing laws against XIVth Amendment. Challenge on both religious and classification grounds. No. 76 on the October, 1960, Appellate Docket, U.S. S.C. No notation of probable jurisdiction at close of preceding term.
Puerto Rico	Laws of Puerto Rico Ann., 33, § 2201 (1956)	Const. of 1952, Art II, § 3	yes	yes	no	yes	*People* v. *Garcia*, 22 P.R. Rep. 759 (1915). Conviction for keeping employees at work after lawful evening hour, affirmed. *Obiter* of Puerto Rico Sunday closing statute; ". . . generally upheld in most of the States on the theory that such regulations are essentially civil and not religious, whose validity is neither strengthened nor weakened by the fact the rest they enjoin is on Sunday."

							and moral debasement which comes from uninterrupted labor.'"
							Clark v. *Texas*, 319 S.W. 2d 727 (Ct. Cr. Ap. 1959). Conviction for Sunday opening of store in violation of Texas statute, affirmed. "We have been presented no argument which would cause us to overrule the prior holdings of this Court in Sayeg v. State, 114 Tex. Cr. R. 153 and the cases there cited, to the effect that the Articles which compromise Chapter Two of Title 7, V.A.P.C. (Sunday Laws) are constitutional."
Utah	Utah Code Ann., § 76-55-1 to -4 and § 11-51 (1953)	Const. of 1895, Art. I, §§ 1, 4; Art. III, §§ 1, 4; Art. X, §§ 12, 13	yes	yes	no	yes	*State* v. *Sopher*, 25 Utah 318, 71 P. 482 (1903). Conviction of Sunday barbering affirmed; statute not "unconstitutional" as denying due process and making an arbitrary classification. (State or Federal Constitution not specified.) Cooley, Constitutional Limitations 734; Field, J., in *Ex parte Newman*, 9 Cal. 518, adopted in *Ex parte Andrews*, 18 Cal. 678; *Specht* v. *Commonwealth*, 8 Pa. 312; *People* v. *Havnor*, 149 N.Y. 195, and other established authorities cited, discussed and relied on, especially to show coincidence of selection of Sunday and religious usage by many people not a ground of unconstitutionality. *Broadbent* v. *Gibson*, 105 Utah 53, 140 P. 2d 939 (1943). Prohibition granted against enforcing Sunday closing statute against proprietors of fruit market. Court states that Sunday closing laws are valid generally, but here the exemptions in favor of tobacco stores, confectionaries, drugstores, etc., render those laws "unreasonably discriminatory and therefore unconstitutional" (State or Federal not specified). *Gronlund* v. *Salt Lake City*, 113 Utah 284, 194 P. 2d

							ute could not be enforced as a religious observance but its aim was to prevent the bad effects of interrupted labor. No unfair enforcement shown as in *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). Order denying interlocutory motion affirmed per curiam, "but, without prejudice to the power and duty of the District Court, as specially constituted, to inquire and determine whether the court has jurisdiction . . . both in relation to the amount involved in the controversy . . . and with respect to the right of the complainant to maintain this suit in equity . . ." 284 U.S. 588 (1931). *Rich* v. *Commonwealth*, 198 Va. 445, 94 S.E. 2d 549 (1956). Conviction in trial court for violating a Virginia statute by keeping a grocery store open on Sunday. On appeal, reversed because State had failed to prove that what Rich did was not a necessity. Court stated, as to a XIVth Amendment argument, that Sunday regulations in general are constitutional exercises of the police power.
Washington	Wash. Rev. Code, Chapter 9.76.010 to 9.76.050 (1956)	Const. of 1889, Art. I, § 11; Art. XXVI, § 1	yes	yes	yes	yes	*Tacoma* v. *Krech*, 15 Wash. 296, 46 P. 255 (1896). Barber convicted of Sunday barbering in violation of city ordinance. On appeal reversed. Ordinance conflicts with constitutional provision forbidding "special legislation," as it singles out one class of citizens. (Apparently State Constitution.) *State v. Grabinski*, 33 Wash. 2d 603, 206 P. 2d 1022 (1949). Defendant convicted of selling uncooked meats and groceries on Sunday in violation of comprehensive Sunday closing statute. He appealed, contending that specific exceptions

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							of tobacco, milk, fruit, drugs, etc., made statute discriminatory and unconstitutional. Also argued unconstitutionality on ground of violation of religious freedom and discrimination on the basis of religious beliefs (State and Federal Constitution, XIVth Amendment). Conviction affirmed. Not unconstitutional to pick Sunday. Originally religious day; now secular law, wishing to select a rest day in seven, "quite naturally selected the day already established by the mores of the people."
West Virginia	W. Va. Code Ann., §§ 6072, 6073, 2833(g) (1955) (Cum. Supp. 1960)	Const. of 1872, Art. III, §§ 11, 15; Art. VI, § 47	yes	yes	yes	yes	*State* v. *Baltimore & Ohio Railroad Co.*, 24 W. Va. 783, 49 Am. Rep. 290 (1884). Commerce clause of Federal Constitution not in conflict with a West Virginia statute forbidding Sunday freight-trains, even when offense occurs on an interstate run.